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## STATES RIGHTS

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THE HANDBOOK SERIES

SELECTED ARTICLES ON  
STATES RIGHTS

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## EXPLANATORY NOTE

The issue raised in this volume is whether the powers and duties of the Federal government should be considerably increased and extended, either by a revision of the Constitution or by a number of appropriate amendments, so as to give the national government jurisdiction and control over several matters that have always been left to the state governments. In other words, it is as a live public question of the day, and not as an historical study, that the subject of states rights is here considered. This modern controversy is a large question, not only in the sense that it is important because of its far-reaching effect, but because it is a comprehensive question, embracing a dozen or more separate propositions, each of which is a great public question in itself. It has therefore been possible to include in the bibliography and the discussion only the more recent and the more general material.

LAMAR T. BEMAN



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## BRIEFS

RESOLVED: *That the powers of the Federal government should be enlarged to give it jurisdiction over all matters that concern the whole nation.*

### AFFIRMATIVE

#### INTRODUCTION.

##### A. The meaning of the question.

1. It is proposed to give the Federal government full control of all national and international affairs.
  - a. This would include the control and regulation of railroads, trusts and monopolies, marriage and divorce, child labor, conservation of the natural resources, and some other matters.
2. Full and complete authority over all purely local matters would be left exclusively to the state governments.
  - a. This question presupposes the repeal of the first section of the Fourteenth Amendment, by virtue of which the Federal government now interferes in purely local affairs.
  - b. The question also presupposes the complete abolition of the Federal aid system, by which the Federal government through gifts, grants, or bounties, directs and controls state action in purely state affairs.
3. The purpose of this resolution is to preserve the dignity and integrity of both

parts of our dual system of government, and to restore harmony between them by removing the causes of friction and misunderstanding.

B. The importance of the question.

1. All of the leading authorities on both sides agree that this is a question of vital far-reaching importance.
2. Woodrow Wilson said, "The question of the relation of the states to the Federal government is the cardinal question of our constitutional system. At every turn of our national development we have been brought face to face with it."

I. There is urgent need for increasing the powers of the Federal government.

A. The basic conditions of life in this country have fundamentally changed since the Constitution was drafted in 1787.

1. The United States was then a small, poor, and undeveloped country.
  - a. There were then in the whole country only about half as many people as now live in New York city.
  - b. The population was thinly scattered between the Atlantic coast and the Alleghany mountains, settled communities often being separated from each other by vast stretches of primeval forests.
  - c. Agriculture was the chief occupation, there being no modern industry and only 3 per cent of the people were living in cities, all of which were small.

- d. The very little commerce there was between the states moved slowly by sail boats along the coast or by vehicles drawn by oxen or horses over unimproved roads.
  - e. There was very little communication between the states for it then cost 25 cents to mail a letter.
  - f. Education was very poor as compared with what it is today.
2. At the time the Constitution was adopted each of the thirteen states was largely sufficient and lived unto itself.
- a. They were kept apart by differences in religious customs and traditions.
  - b. Their political and social institutions differed very greatly, such as the town system of local government in New England and the county system in Virginia, free labor in the north and African slavery in the south.
  - c. Each state then had very little interest in how the others handled their affairs, and was very little effected by what the others did.
3. There was then no national consciousness.
- a. All feeling of patriotism and loyalty was then toward the states.
  - b. There was then among the people no such feeling toward the United States.
- B. While the Constitution may have been well adapted to the conditions that prevailed when it was adopted, modern conditions demand greater centralization of government.
1. The conditions of today make uniformity necessary in many matters where it was

not necessary or even desirable one hundred and forty years ago.

- a. The railroads, entirely unknown at the time the Constitution was adopted, are the industrial arteries of modern life and they should be controlled and regulated as a unified system by the national government, for it has been clearly demonstrated that decentralized control will always mean chaos.
- b. Child labor should be regulated by the Federal government, because the products of such labor in a few states now compete in the same market with goods manufactured by adult labor.
- c. Marriage and divorce laws should be uniform to eradicate polygamy completely and to end the scandals caused by people going to another state where lax divorce laws make it easier to get a decree.
- d. The great industrial corporations are not entirely in the power of any state and must be brought under effective national regulation.
- e. There are many phases of the control of commerce, such as negotiable instruments, where uniformity is very essential.
- f. Insurance has grown to proportions beyond the effective control of any one state.
- g. These and some other matters were not national problems in 1787, but they have become national problems because our economic development has altered the basis of life on which

the original division of powers in the Constitution was made.

2. The need for a greater measure of centralization is shown by the existence of the National Conference of Commissioners on Uniform State Laws.
  - a. This organization is an auxiliary of the American Bar Association.
  - b. Its members, three from each state, territory, and possession, are appointed by the governor.
  - c. It has been in existence for thirty-five years, or since 1890.
  - d. It has drawn up and recommended the adoption of uniform laws on thirty-eight different subjects, and is now at work on twenty-three other subjects.
3. Uniformity can only be secured by the action of the Federal government.
  - a. Without Federal control the states will bid against each other for commercial and industrial advantage to the great disadvantage of the nation as a whole.
    - (1) Some states permit little children to work in shops, factories, and mines in order that the industries of the state may have the advantage of cheap labor in competing with the industries of other states.
    - (2) A few states have made a practice of granting charters on very favorable terms to the great corporations that are doing business all over the country.

- (3) In several states divorces are granted on trivial grounds.
- (4) Some states permit the ruthless and wasteful destruction of their forests or other natural resources.
- (5) Some of the states have passed laws to compel interstate railroads to favor their people as against the people of other states through which the railroad extended, or in other ways to interfere with interstate commerce.
- (6) One or two states have not exerted themselves in the direction of stamping out polygamy.
- b. The commissioners on uniform state laws have almost totally failed in their efforts to secure uniformity, even in the most important matters.
  - (1) Most of the uniform acts they have drafted have not been enacted by any considerable number of states.
  - (2) Even those few uniform laws that have been adopted by most of the states have not secured uniformity, because they are usually adopted by states with some slight variations and always there are wide differences in interpretation by the different state courts.
  - (3) No uniform law has ever been proposed or even considered concerning the matters where

uniformity is most necessary, like railroad regulation, prohibition of watered stock, or the control of trusts and monopolies.

- C. Lack of adequate power in the hands of the Federal government has been a great detriment to the country and has produced many bad results.
1. It has forced the Federal government to resort to other means to meet the most urgent of these problems.
    - a. It has resorted to the fifty-fifty subsidy system which the governor of Wisconsin has denounced as a form of bribery.
    - b. It has resorted to the use of the treaty-making power as a means of correcting serious evils in purely domestic affairs, as in the treaty with Great Britain concerning the migratory birds of the United States and Canada.
    - c. It has been forced to usurp powers not specifically delegated to it by the Constitution.
    - d. It has had to resort to judicial interpretation by which the Federal courts have extended the powers of the Federal government.
  2. Many important problems are now pressing for a solution possible only by Federal action, but over which the Federal government has no constitutional power.
    - a. In several states little children are now working long hours in factories, shops, and mines.

- (1) This awful abuse is undermining the health, vigor, and intelligence of posterity.
- (2) It is a national problem because it is weakening our man-power, deteriorating our manhood, and shocking the moral conscience of the nation.
- b. The nickle in the slot divorce system that made Reno famous is still in vogue in some states.
- c. Public education is in a frightful condition in several states.
  - (1) In several states education is practically denied to colored children.
  - (2) The percentage of illiteracy in this country is sixty times as large as it is in Germany.
  - (3) The census of 1920 shows that in seven states more than 15 per cent of the adults are illiterate, and the army tests indicate that these figures do not tell half the truth.
  - (4) Millions of children are being taught by unqualified teachers. (*See The Reference Shelf. Vol. 1, No. 3.*)
- d. Insurance has grown to such proportions that it is beyond the power of any state to regulate or control it.
- e. Many states fail to make any provision for meat inspection.
  - (1) The most diseased meat, or meat otherwise the most unfit for food, may be sold for food



- within the state where it is killed and the Federal government is powerless to prevent.
- f. Forty-nine different sets of regulations hamper the railroads and interfere with the transportation of the nation's commerce.
- (1) Many state laws regulating the railroads are adopted for narrow and selfish reasons, and do a great harm to the nation. (*See* address of A. P. Thom in the 1915 Tennessee Bar Association, page 88.)
- g. Most of the larger corporations are very greatly overcapitalized.
- (1) It has been said that the capital of the steel trust at the time of its organization was 100 per cent water.
- (2) Overcapitalization has two chief purposes, to make it possible for the owners to sell it for more than it is worth, and to enable the concern to charge higher prices by the claim that it must pay dividends on its stock, both of which are simply obtaining money under false pretences.
- h. In many states the natural resources are being wasted.
- (1) There is usually terrible waste in the cutting of lumber.
- (2) There is generally inexcusable waste in the mining of coal.
- i. Many of our natural resources,

such as petroleum, natural gas, anthracite coal, and others are in the iron grip of a monopoly that charges the consumer from two to ten times what these things ought to cost.

- j. Many of the necessities of life are now absolutely controlled by great corporations or trusts, which have an absolute monopoly so far as fixing the price for the whole country is concerned.

- (1) This is the cause of the concentration of wealth in this country, so that 2 per cent of the people own over 60 per cent of the wealth.

- (2) It is also the ultimate cause of the bankruptcy of so many of our farmers, and will result in the destruction of our civilization unless a remedy is found.

- k. Without Federal action the great corporations that do business over the country will be unregulated and uncontrolled by law, for it is now very clear that they are out of reach of the state governments.

## II. An increase in the powers of the Federal government is wise and desirable.

- A. Our Federal government has never had adequate power.

- 1. It has less power than any other Federal government in the world.

- a. The other leading Federal governments are Canada, Australia, South

Africa, Switzerland, Germany, Brazil, and Mexico.

- b. In all of these countries the Federal government now has practically all of the powers we are now proposing to confer on our Federal government, and in several of them it has far more power.
- 2. Only by stretching the Constitution, in other words violating it, has it been possible to make it survive to the present time.
  - a. The Supreme Court usurped the power to annul any law passed by Congress or a state legislature.
  - b. With this supreme power the Supreme Court proceeded to develop the doctrines of "broad construction" and "implied power" and by this means gave to the Federal government enough power to keep it alive.
- B. For many years the state governments have been inefficient and deficient.
  - 1. They have been extremely selfish and narrow.
    - a. Laws have often been passed that interfere with the commerce of other states.
      - (1) West Virginia has passed laws to prevent piping natural gas out of that state in an effort to get the industries of other states to move there.
      - (2) Laws have been passed in three states to prevent a railroad from taking a car that needed repairs to another state to be repaired.

## SELECTED ARTICLES

- (3) Fifteen states have attempted by heavy penalties to secure preferred treatment of their state railroad traffic from interstate railroads.
- b. Several states have levied taxes with the intention that they would be ultimately paid chiefly by the people of other states.
  - (1) Pennsylvania taxes all the anthracite coal mined.
  - (2) Minnesota has attempted to levy a similar tax on the iron mined.
- 2. State legislatures are usually made up of small caliber politicians and are often very corrupt.
  - a. This is the reason that public sentiment forced the adoption of the Seventeenth Amendment taking away from the legislatures the power of electing United States senators.
  - b. One of the striking examples of wholesale corruption was the fifty year franchise bill which was bought through the Ohio legislature in 1896.
- 3. State governors are generally cunning politicians without any trace of statesmanship and often very corrupt.
  - a. Governor Ferguson of Texas and Governor Selzer of New York were impeached and removed from office.
  - b. Governor McCray of Indiana was sent to the Federal penitentiary at Atlanta for a long term in the midst of his term as governor.
  - c. Governor Jonathan M. Davis was arrested on the charge of selling a

pardon at the close of his term of office.

- d. Governor Small of Illinois has been a defendant in both civil and criminal actions which charge misuse of public funds.
- e. Not six of the forty-eight governors can possibly be called statesmen.

C. It is the natural and logical division of power.

- 1. It gives the Federal government full control over all matters that concern the whole country.
- 2. It gives the state governments complete authority in all those things that do not concern or affect any other state.
- 3. It will preserve the dignity and integrity of both.
- 4. It will remove the continual friction that has always existed between the Federal government and the states in the past.
  - a. This friction has been largely due to jealousy and was made possible by the lack of a division of power that was clear and definite along natural and logical lines.

III. To increase the powers of the Federal government is a practicable remedy.

A. It is a plan that has worked well in all the other Federal governments of the world.

- 1. It is the system in vogue in Canada where conditions are very similar to those in the United States.
- 2. Both Australia and South Africa have a vast extent of territory but both vest in the central government more power than does the United States.

3. Germany, Switzerland, Brazil, and Mexico have succeeded well by giving the central government full power over all matters that concern the whole country.
- B. Great good has been accomplished for everybody in this country by the recent extension of Federal activity.
  1. The railroad service has been greatly improved by Federal legislation.
    - a. The Interstate Commerce Act of 1887 which created the Interstate Commerce Commission and the subsequent acts which have increased the powers of the commission have put an end to railroad rebates and discriminations, by which individual shippers or localities were favored, and to many other abuses.
  2. Federal legislation has brought system out of chaos in the matters of money and banking.
    - a. The National Bank Act of 1863 gave the country a system of sound and reliable banks.
    - b. The law levying a tax of 10 per cent on state bank notes ended the wildcat currency.
    - c. The Federal Reserve Act completed the work of giving the United States the best financial system in the world.
    - d. The Postal Savings Bank and the Federal Farm Loan Banks supply a vital need.
  3. In the matter of food and drug adulteration the Federal government has done much good.

- a. The pure food and drug law excludes from interstate commerce all adulterated or misbranded foods and drugs.
- b. The meat inspection excludes from interstate commerce all diseased meat or meat otherwise unfit for food.
- 4. The Federal government has also accomplished much good in matters involving the public health, safety, and morals.
  - a. It has excluded lottery tickets from the mails and from interstate commerce.
  - b. It has provided severe penalties for using the mails to defraud.
  - c. It has excluded stolen automobiles from interstate commerce.
  - d. The Harrison Narcotic Act has done much to decrease the harm from the use of the powerful narcotic drugs.
  - e. The National Prohibition Act, commonly known as the Volstead Law, makes it a crime to manufacture, sell, transport, import, export, or possess any intoxicating liquor, which everybody knows is neither food or medicine, but poison pure and simple.
  - f. Much good has also been accomplished by the Mann Act.
  - g. The National Quarantine Act of 1898 brought efficient protection to another field in which state action had failed.
- 5. Conservation and reclamation have been given a real meaning as the result of Federal legislation.
  - a. Large tracts have been set aside as Federal forest reserves.

- b. Legislation has been adopted to develop and conserve the water power in the western states.
- c. By cooperation with the states vigorous action has been taken to prevent forest fires and to carry out of systematic policy of reforestation.
- 6. The national bankruptcy law has superseded the various state laws on this subject and brought uniformity out of chaos.
- 7. By cooperation with the states much has been accomplished in several fields of activity.
  - a. In the field of education, where state universities have been organized, agricultural education fostered, vocational education encouraged, and rehabilitation established, the Federal government has aided and encouraged the states to do things that could not have been done otherwise.
  - b. Agricultural extension work and farmers' cooperative demonstrations have been established.
  - c. By this method highway construction has gone on much faster than it could without Federal help.
  - d. The national guard has also been strengthened and unified.
  - e. The Sheppard-Towner Act has done much good in the field of maternity and infant hygiene.
- 8. These are but a small part of the things the Federal government has done in recent years.
- C. In all our history states rights has been a false doctrine.



1. It has been used as a mask by selfish interests to make money by perpetuating horrible and hideous wrongs that were indefensible except by hiding behind the pretext of states rights.
  - a. Behind states rights hid those who sought to perpetuate the slave trade and succeeded in making a compromise by which it was maintained until 1808.
  - b. For seventy-five years those intent upon perpetuating human slavery in America hid behind states rights.
  - c. The monstrous disgrace of polygamy was a child of states rights.
  - d. For a hundred years the poison trust, called the liquor traffic, hid behind states rights, and it is still trying to do so now.
  - e. States rights made possible railroad rebates and discriminations which were the means of building up the trusts and monopolies of this country.
  - f. States rights has championed nullification, secession, and civil war.
  - g. Behind the smoke screen of states rights now line up all of those who want to make money out of the labor of little children, who want to deny education to the colored children of the south, who want to perpetuate the evils of overcapitalization, who want to waste the irreplaceable natural resources of the country, or who want to perpetuate other frightful wrongs because they can make money by doing so.

2. States rights has always been used as a prize bugaboo with which to frighten the unthinking.
  - a. Its advocates often speak of the Federal government as a despotism, as remote from the people, as unresponsive to the popular will, and of the state legislatures as the personification of democracy, freedom, and wisdom.
    - (1) Much of this line of talk comes from states that actually deny the right to vote to a large part of their citizens, some even to a majority of their citizens.
  - b. Its champions talk a good deal about Federal power destroying the states.
    - (1) Of course they know this is all nonsense, and that nobody has any such intentions.
    - (2) Everybody knows this would be impossible for the Supreme Court has held that, "The Constitution in all its aspects looks to an indestructible union of indestructible states." (Texas vs. White, 7 Wall 725)
3. The most earnest advocates of states rights have not hesitated often to ignore doctrine entirely, even in the most important matters.
  - a. Jefferson annexed Louisiana and recommended that the Federal government be given power to make internal improvements.
  - b. Cleveland sent Federal troops to Illinois without the request of the

- governor of the state and over his vigorous protest.
- c. Andrew Jackson handled South Carolina's threat of secession, then a part of the states rights doctrine, just like Theodore Roosevelt would.
  - d. Under the administration of Woodrow Wilson the Federal powers were greatly and wisely extended.
    - (1) It was then that the Federal reserve system was organized.
    - (2) It was in this administration that the fifty-fifty system of Federal subsidies was begun.
    - (3) Vast war powers, unheard of before in American history, such as railroad control and price fixing, were exercised by the Federal government.
  - e. William J. Bryan, though loud in defending states rights, favored extension of the Federal power even to extremes.
    - (1) He advocated the ownership of all the railroads by the Federal government.
    - (2) He was strong for national prohibition and national enforcement of prohibition.
    - (3) He favored Federal control of trusts and monopolies.
    - (4) He even declared he favored a Federal child labor law.
  - f. All the champions of states rights back in the fifties were unanimous in supporting the Federal fugitive slave law.

4. After the great corporate interests found it was to their advantage to raise this false issue in the industrial conflict of to-day, then certain classes were quick to fall in line.
  - a. Corporation lawyers, and former corporation lawyers who are now serving as judges, suddenly awoke to the necessity of maintaining states rights,
  - b. College presidents, anxious for large gifts for their institutions, began to fear for the future of free government.
  - c. It is encouraging to see that they do not openly defend child labor, adulterated food, easy divorces, monopoly control of industry, railroad rebates or discriminations, insurance frauds, overcapitalization, or the other evils of today with such warmth of enthusiasm or such profusion of biblical quotation as their prototypes championed human slavery two generations ago.
- D. The loss of power and prestige by the state governments has been due chiefly to the lack of confidence in them by their own citizens who have placed restrictions upon them.
  1. The initiative and referendum have curtailed the power and prestige of most of the state legislatures.
  2. In some states the recall has been added.
  3. In many states the duration of the session of the legislature is very limited and is fixed in the constitution.
  4. Municipal home rule has lessened the

power of the legislatures of seventeen states.

5. In several states the constitutions are elaborate codes of law, not merely a framework of the government, and this is done because of lack of confidence in the legislature and it curtails the power of the legislature.

#### NEGATIVE

- I. It is unnecessary further to increase the powers of the Federal government.
  - A. The distribution of power between the states and the Federal government fixed in the Constitution is based on sound governmental policy.
    1. The Federal government is given adequate power over all matters that concern the whole country.
      - a. It has full power over all foreign affairs.
      - b. It has complete power over all things in which uniformity is necessary.
    2. The state governments are best able to handle their own local problems.
      - a. Local legislators will know the needs and conditions of their states and districts better than representatives from a distant state.
      - b. The local representatives will feel a sense of responsibility to the people effected.
  - B. The distribution of power fixed in the Constitution has worked well for one hundred and thirty-seven years.

1. It has stood the test of time, met and overcome all the difficulties that have arisen.
  - a. The United States has always been a government of law and not a government of men.
    - (1) It has been entirely free from personal revolutions, seizures of the government by some prominent individual or some group which have occurred so often in France and in most of the republics to the south of us, and which have occurred occasionally in almost every other country in the world.
  - b. Under our Federal Constitution this country has enjoyed far greater development and prosperity than any other country in the history of the world.
  - c. The average man is now better off in this country, has more of the pleasures and comforts of life, than in any other country in the world.
  - d. An opportunity for every person to use his abilities is greater in this country than it is now or ever was in the past in any other country in the world.
2. It is not too rigid.
  - a. Wise judicial interpretation, always construing the Constitution as a living instrument, has made it grow and develop with the needs and conditions of the country.

3. Our Constitution has been praised and endorsed by the best minds in the world.
  - a. Gladstone said, "The Constitution of the United States is the most wonderful work ever struck off at a given time by the brain and purpose of man."
  - b. William Pitt said, "It will be the wonder and admiration of all future generations and the model of all future constitutions."
  - c. President Coolidge has said, "To live under the American Constitution is the greatest political privilege that was ever accorded to the human race."
  - d. It has been widely copied or used as a model by other countries.
- C. All the additional powers it is proposed to give the Federal government can be handled better by the states.
  1. The regulation of child labor is essentially a state matter.
    - a. No uniform Federal law can fit all conditions in every community in this vast country.
    - b. The standards ought to be higher in an advanced industrial state where the population is largely urban than they are in a sparsely settled agricultural state whose population is chiefly rural.
    - c. In the more advanced states child labor laws are still in the experimental stage, for we are beginning to understand that refusing a chance to work to children who cannot make

progress in school appears to be a prolific cause of crime.

2. Marriage and divorce laws are not a proper subject for uniform national legislation.
  - a. Polygamy has been abolished by state action and is no longer an issue.
  - b. The great variation in social and economic conditions and standards in the different states makes uniformity very undesirable.
  - c. A national divorce law could not prevent people from going to France or Mexico to get a divorce.
3. Insurance is a matter that is better left to the states.
  - a. They have ample power to deal with it so as to protect their people.
  - b. They have handled it in a satisfactory way in the past.
4. The states have power to control and regulate corporations.
  - a. All corporations must obtain a charter from some state in order to come into being.
  - b. The state which issues the charter has the power to control and regulate the corporation.
5. The conservation of natural resources has been well handled by the states.
  - a. Many states have forest reserves, forest fire prevention service, reforestation work, and laws to prevent waste in lumbering.
  - b. Other phases of conservation are equally provided for by state action.



6. Intrastate commerce should be left to the states.
  - a. The Federal government has full control over all interstate commerce.
  - b. A railroad entirely within one state ought to be controlled and regulated by that state.
  - c. Traffic between points within a state is a proper matter for the control of that state.

II. It is unwise and undesirable to increase further the powers of the Federal government.

A. It is un-American.

1. The most fundamental idea in the whole American system of government has always been to confer upon the Federal government only those few specified duties of concern to the whole country in which uniformity is necessary, and to preserve the autonomy and dignity of the states by reserving all other powers to them.
  - a. This was the great American contribution to the science of government.
  - b. It is the world's most successful experiment in enlarging liberty and freedom, for it permits the will of the people to prevail over a larger sphere of activity.
2. America has always been the world's greatest example of home rule.
  - a. Great Britain has followed our example in using the Federal form of government for Canada, South

Africa, and Australia, and in granting home rule to Ireland.

- b. Mexico, Brazil, and other countries have copied this feature of our government.

B. Nothing would be gained by it.

1. There is no reason to think that Federal action in any of these matters would be superior to state action.
2. The Federal government has failed in many important matters.
  - a. It has entirely failed to enforce the Fifteenth Amendment.
  - b. It is making a sorry job of enforcing the Eighteenth Amendment.
    - (1) President Harding declared it to be a nation-wide scandal.
  - c. Our pension system has been the most extravagant and wasteful in the whole history of the world.
3. Corruption has been as prevalent in the Federal government as in the states, though it has been less exposed.
  - a. One President owned stock in Credit Mobilier.
  - b. Two former cabinet members are now [July 1926] under indictment and awaiting trial, charged with abuse of trust for private gain.
4. Uniformity is not desirable except where it is absolutely necessary.
  - a. The country is too vast—large as all Europe.
  - b. Conditions vary too much in the different sections.

C. It would have a tendency to increase lawlessness and crime.

1. Laws cannot be enforced unless public sentiment is back of them.
  - a. Local sentiment in many communities will always be different from national sentiment.
  - b. No general law regulating local affairs, or affairs the people have become accustomed to consider as local, can fail to displease thousands of local communities.
2. Unenforcible laws develop and increase crime.
  - a. They foster disrespect for all law.
- D. It would make it impossible to conduct social governmental experiments.
  1. Such experiments must be conducted on a small scale.
  2. They must be tried where conditions are favorable.
  3. Many of the states have been great sociological laboratories.

III. It is impracticable to increase still further the powers of the Federal government.

- A. By various forms of constant encroachment the Federal government has already usurped many of the powers that the Constitution reserved to the states.
  1. The Federal powers have been extended by formal Amendment to the Constitution.
    - a. The Fifteenth and Nineteenth amendments extended the Federal control over suffrage.
    - b. The Fourteenth Amendment gave the Federal government vastly increased powers, and it has been so construed

- as to give it enormous power over the states.
- c. The Sixteenth Amendment added vastly to the power of the national government.
  - d. The Eighteenth Amendment greatly increased Federal power and duty.
2. By judicial usurpation of Federal courts have almost rewritten the Constitution.
- a. The Federal courts have usurped the power of an absolute veto over all laws regularly enacted by the states or by Congress. (*Marbury vs. Madison*, 1 Cranch 137)
    - (1) Nowhere in the Constitution is this power given to the Federal courts, either directly or by implication.
    - (2) Four different times the Constitutional convention voted down a proposition to give this power to the Federal courts. (Judge Walter Clark. *Arena*. 37: 149)
    - (3) By the courts of no other country in the world is this power exercised.
  - b. The Federal power has been greatly enlarged by the policy of the Federal courts in accepting the doctrine of loose construction or liberal construction.
  - c. The Federal courts have invented the doctrine of implied powers as an excuse for continually increasing the powers of the national government
  - d. Exercising all these usurped powers

the Federal courts have proceeded continually to add to the powers the Constitution gave to the Federal government and to curtail the powers reserved to the states, for example:

- (1) They have enormously increased the powers of the Federal government over the states by deciding that a corporation is a person within the meaning of the first section of the Fourteenth Amendment, which was adopted for the purpose of giving civil rights to the recently emancipated colored people. The intentions of those who secured the adoption of this amendment were entirely disregarded in reaching this conclusion, although the intentions of the framers made the basis of the decision of the court that decided that the words "from whatever source derived" in the Sixteenth Amendment do not mean what they say very clearly, and are of no effect whatever. Though the reasoning is inconsistent, both decisions are in harmony to the extent that they are favorable to the corporations.
- (2) They have vetoed many important state laws which certainly did not violate the letter of the Constitution, on the pretext that

they were contrary to the spirit of the Constitution.

3. The Federal powers have been vastly extended by congressional action.
  - a. By what is known as the fifty-fifty subsidy system, which the governor of Wisconsin has called a form of bribery, the Federal power has been extended to fields in which the Constitution gave the Federal government no power at all, such as education, highway construction, maternity and infant hygiene, rehabilitation, etc.
  - b. By use of the taxing power for other purposes than taxation, national power has been increased.
  - c. By resort to the treaty-making power, Federal power has been extended into forbidden fields.
4. By executive action also have Federal powers been increased.
  - a. These extensions have been under the guise of necessity, most of them military necessity.
- B. The Federal government is now inefficient, overgrown, and top-heavy.
  1. Its personnel has increased enormously in recent years.
    - a. It now employs over five hundred fifty thousand persons, exclusive of the military and naval forces.
    - b. This is an increase of more than 400 per cent since 1900, during which time the population increased only about 50 per cent.

2. The cost of the Federal government has increased even faster than the personnel.
  - a. It now costs between \$3,000,000,000 and \$4,000,000,000 a year.
  - b. After excluding all World War costs, this is still an increase of between 300 and 400 per cent since 1900.
3. The administrative branch of the Federal government is now a huge and powerful bureaucracy.
  - a. It is now composed of more than two hundred different bureaus, boards, and commissions.
  - b. About forty of these are not in a department of the government under a cabinet officer, and are subject to no supervision except from the President.
  - c. The President is overworked, crushed with a mass of detail, and unable to give any real supervision.
  - d. Each of these bureaus is a powerful political machine, so strong that it can prevent Congress from reducing its personnel or lowering the salaries of its members.
  - e. Every President for the last twenty-five years has tried to get the administrative branch of the Federal service systematized, coordinated, and made more efficient, but his efforts have always been blocked by this organized bureaucracy.
  - f. On December 10, 1925, Congressman Martin L. Davey of Ohio introduced a bill to reorganize the government service and provide for the removal

of unnecessary and useless government employees, and later he made some remarks upon the subject, which were immediately followed by a vicious tirade of vindictive personal abuse directed at Mr. Davey and broadcasted over the country, thus proving that the government employees at Washington are organized into a powerful political machine for selfish purposes and are determined to prevent any reorganization of the government service that will secure efficiency or eliminate the drones and loafers. (*See remarks of Congressman Davey, Congressional Record, February 22, 1926*)

4. Even the Federal courts have deteriorated as a result of increased powers and duties.
  - a. Prolonged delays make it difficult to secure justice.
    - (1) It took twenty-one years to get a decision between the city and the railroads involving the ownership of the lake front in Cleveland.
    - (2) It is now two years since knowledge of the Teapot Dome scandal became public, but no one of those indicted for bribery has yet come to trial.
  - b. The Federal courts often seem to favor the rich as against the poor. (*Social Press: A Handbook of the Liberal Movement. page 147 et seq.*)
  - c. They frequently render arbitrary decisions even in the most important



matters, and sometimes by a vote of five to four.

(1) This was the case in the income tax decision in 1895, and in this case one judge changed his mind over night. (*See Seligman, The Income Tax. Part 2, Chapter 5.*)

5. The legislative branch of the Federal government has deteriorated even more than the others.

- a. Great leaders have practically disappeared from the halls of Congress.
- b. Congressional debate is inferior to what it was in earlier generations.
- c. Business is often transacted with only a handful of members present.
- d. The Senate has become practically impotent.

(1) For two years the Senate talked about the Versailles Treaty and the League of Nations.

(2) Vice-President Dawes pleads for reform of the Senate rules in vain.

C. As a result of this constant encroachment and usurpation the state governments have continually lost power and prestige until they now occupy a very subordinate place in our system of government.

1. The people have lost interest for the most part in state affairs.

- a. The vote in national elections is always much greater than at state elections.

- b. Important state issues submitted to the people in referenda often receive the votes of only a small part of the voters who actually go to the polls.
  - 2. The people have lost confidence in state legislatures.
    - a. They have placed many constitutional restrictions upon them.
    - b. It is no longer an honor to be a member of a state legislature in most states.
  - 3. Important offices in the state governments are now filled by inferior men.
    - a. Very few governors can be ranked with the governors of a generation ago.
    - b. Legislatures are composed of very inferior men.
- D. The further extension of Federal power proposed in this question will render the states impotent and lead to the ultimate destruction of free government in America.
  - 1. The battle for states rights has been a continual retreat ever since the adoption of the Bill of Rights.
    - a. In Jefferson's time states rights meant a belief that the Constitution should be construed literally and strictly, which would give the Federal government a minimum amount of power.
    - b. The Virginia and Kentucky resolutions claimed for the states the right to nullify within their jurisdiction any Federal law that should transcend the powers delegated to the Federal government by the Constitution.

- c. Chief Justice Marshall invented the doctrine of implied powers as a means of stretching the jurisdiction of the Federal government.
  - d. The Hartford Convention, South Carolina, and the southern confederacy claimed for every state the right to secede from the union at will.
  - e. Hayne vigorously opposed internal improvements as beyond the constitutional powers of the Federal government.
  - f. The Civil War destroyed the doctrines of secession and nullification, and practically destroyed the doctrine of strict construction.
  - g. States rights is now a defensive doctrine, a struggle for existence, a battle for self preservation.
2. The further extension of Federal power proposed in this question would mean the destruction of the states.
- a. They would become mere administrative districts like the counties.
3. This would mean the ultimate destruction of free government in America.
- a. It would double the army of office holders who now infest Washington and make an invincible bureaucracy that would control President and Congress and rule the country.
    - (1) Bureaucracy is not free government: it is too far removed from the people.
    - (2) The Federal government is

easier controlled by the powerful financial interests.

- (3) The country would be ruled chiefly by the orders, decisions, decrees, and rulings of hundreds of bureaus, boards, commissions and their administrative officers at Washington.
- b. A powerful and intrenched bureaucracy is an evil almost impossible to remedy.
  - (1) It is made up of an army of office holders, many of whom are protected by civil service rules, who all look upon their government job as a vested right, and who devote their combined organized efforts to prevent and reform to secure economy or efficiency in the service.

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## INTRODUCTION

Ever since the Constitutional Convention of 1787 came out of the closed doors behind which all of its sessions were held with the utmost secrecy and laid before the thirteen states its final draft of the Constitution it had drawn up, the controversy over states rights has been a vital public issue in this country. For one hundred and thirty-eight years the question of states rights has been continually discussed, often in debates so violent that they generated far more heat than light. On this issue the Civil War was fought, and while many eminent statesmen have assured us most earnestly that the question was settled once and for all by the stern arbitrament of fratricidal warfare, yet the question of states rights is still with us, and probably, like the poor, it always will be with us. The Civil War did settle, and apparently permanently settled, the question of nullification and secession, so that while the term states rights is still with us as the name of a great question of public policy, yet the form and substance of the question are very different from what they were when the Civil War began. The term states rights has meant different things in the different periods of our history. When the Constitution was first presented to the country it meant the demand led by Jefferson that there should be added to the Constitution a Bill of Rights, to safeguard the rights of the states and to settle beyond any possible doubt the fact that all powers not given to the Federal government were still vested in the states. After the advocates of states rights had secured the adoption of such a Bill of Rights as the first ten amendments to the Constitution, they advocated strict construction of the powers

granted to the Federal government and opposed internal improvements by the Federal government. Later states rights meant the doctrine of nullification, and finally it came to mean secession, the claim that any state could peacefully withdraw from the union at any time it wanted to do so. After the Civil War had settled the doctrine of nullification and secession, states rights became a negative or defensive doctrine, resisting the enlargement of the powers of the Federal government.

In 1908 Woodrow Wilson said in his book *Constitutional Government*. "The question of the relation of the states to the Federal government is the cardinal question of our constitutional system. At every turn of our national development we have been brought face to face with it, and no definition either of statesmen or of judges has ever quieted or decided it. It cannot, indeed, be settled by the opinion of any one generation, because it is a question of growth, and every successive stage of our political and economic development gives it a new aspect, makes it a new question."

As one of the debatable public problems of today states rights is a large and an important question. It is one of the most important questions, because of its far-reaching effects upon the people and the institutions of this country. It is a large question because it comprehends and embraces a dozen or more propositions each of which is a great public question in itself. By states rights we mean today the negative and defensive proposition that the Federal government shall remain as it is and not further extend and enlarge its powers and its jurisdiction at the expense of the states. Opposed to states rights are the federalists of today, of whom President Roosevelt was the foremost spokesman up to the time of his death. It was he who coined the phrase "new nationalism" as the name for the policy that favors expanding and enlarging the powers and duties of the Federal government.

The members of this nationalist group are not agreed as to just what additional powers should be conferred upon the Federal government. Any list of powers that might be compiled would omit some things that some of this group would have turned over to the national government. Any such list would also contain powers which some of the nationalists would think should be left to the states. Nevertheless, in a general way, it may be said that the position of the nationalist is that the Federal government should be given power: (1) To regulate and control corporations doing an interstate business, possibly by requiring them to take out a Federal charter or license, so as to prevent price fixing, unfair competition, restraint of trade, overcapitalization, profiteering, monopoly, and all the other evil practices so prevalent in big business and industry at this time.

(2) To control and regulate intrastate railroads and intrastate railroad traffic, just the same as it now controls interstate railroads and interstate railroad traffic, so as to treat as a unit that which so obviously is a unit, the railroad problem.

(3) To regulate or prohibit child labor, so as to end this frightful abuse in those states that absolutely refuse to take such action in the matter and so as to make the restrictions uniform throughout the country, that no advantage in the competition for the markets of the country may accrue to those states of low ideals and selfish purposes that still permit little children to work long hours at hard labor in shops, factories, and mines.

(4) To control and regulate the use and development of the natural resources of the country by a set of laws as near uniform as the varying conditions will permit, to prevent the terrible waste that has been going on in the producing, marketing, and using of the irreplaceable fuel resources of the country, coal, gas, and oil; to have full power over forestry, to regulate and control the cutting of the forests, the reforestation work, forest fire

prevention work, and the forest reserves, so as to stop the frightful waste that have been going on in the lumbering industry and to check so far as possible the terrible losses due to forest fires, and to restore the balance between the amount of lumber annually grown in this country and the amount annually consumed, for we are now using up our lumber supply four times as fast as it is being grown, and this condition can never be remedied by decentralized control which looks primarily to the development and the encouragement of the local industries in their struggle to compete with the industries of other states; to prevent further monopolization of water power, coal and iron deposits, and the other gifts of nature that ought to be the heritage of all the people and not the lever by which the few may tax the many; and to supervise and control the great superpower system that is just beginning to be built in this country.

(5) To enact a uniform marriage and divorce law, so as to prevent people from migrating to another state of lower ideals and more lax laws to secure either marriage or a divorce which they could not obtain from their own state: such things as first cousins going out of their own state to a distant state to get married and then returning to their own state to rear their imbecile children; or rich married people going to a nickel-in-slot divorce mill in some remote state to get a divorce by collusion under conditions that are a public scandal and a shock to the moral conscience of the home community.

(6) To prevent the further issue of tax exempt securities by the states or their political subdivisions, by investing in which many of the very rich people succeed in evading their just share of taxation to the Federal government under the income tax.

(7) To create a national department of education with a cabinet member at its head and give it power to

fix minimum standards in public education which all the states shall be required to meet, so as to equalize the educational opportunities of the country, to prevent so many untrained and unqualified teachers from being employed, to prevent the practical denial of any real educational opportunity to most of the colored children in more than a dozen states, to prevent the use of such miserably poor school buildings as millions of children now inhabit every day, and ultimately to reduce our high rate of illiteracy, so that this country will no longer have sixty times as high a percentage of illiteracy as Germany has.

(8) To construct and maintain extensive reclamation projects chiefly within the arid region of the west.

(9) To regulate and control insurance companies doing business outside of the state where they are incorporated, so as adequately to safeguard and protect the millions of dollars that are spent each year for this purpose.

(10) To construct and maintain highways in and through states where they are needed for any national purpose or where the state is unable or unwilling to build them.

(11) To inspect meat and other foods that do not enter into interstate commerce, so as to safeguard the health of the people.

While, as has been said, not all of the nationalists favor giving the Federal government power to do all of these things, neither, on the other hand, are all of the defenders of states rights opposed to all of them. In fact, almost any one of the projects which the nationalists advance to increase the power of the Federal government will receive the support of many who claim to be the champions and the defenders of states rights. This has always been the case. Jefferson was willing to take a chance in annexing Louisiana. The southern states-



men were unanimous in support of the Federal fugitive slave law. The prohibition amendment received the support of almost all the congressmen who are strongest in their lip service to the cause of states rights, and it was ratified by the legislatures of every one of the fifteen or so southern states which Bryan was pleased to call the states rights states. In an editorial on January 28, 1926, the *New York Times* said, "States rights is good to make speeches about; pretty sure to be thrown away when the vote comes."

Those who advocate giving the Federal government these additional powers believe that changes in the economic and social conditions have now made national problems out of what were local issues when the Constitution was adopted. Roosevelt declared that business is already centralized while governmental control lags behind. Dr. Charles W. Eliot has declared that local interests have become continental interests. "It has become entirely unnatural and scarcely longer endurable that the law governing commerce should not be exclusively national," says Professor John W. Burgess. This group is impatient, wants to see abuses remedied in this generation, believes that the Federal government is more efficient than the states, and that it will remedy those things like child labor, poor school systems, waste of natural resources, unfair competition, easy divorces, etc. which the states have refused or at least have failed to remedy.

Those who believe in the states rights principle include many of our country's foremost scholars and statesmen, such men as President Coolidge, Secretary Herbert Hoover, Nicholas Murray Butler, President of Columbia University, William J. Bryan, Governor Albert C. Ritchie of Maryland, Governor E. Lee Trinkle of Virginia, Governors Silzer and Moore of New Jersey, and hundreds of others. Most of them feel that the Federal government has already gone much too far in



extending its powers at the expense of the states. Some of them think it was a mistake to adopt the Fifteenth and Sixteenth Amendments, and most of them feel that the adoption of the Eighteenth Amendment was a serious mistake as would be the adoption of the proposed Twentieth Amendment. They fear the results and effects of a more powerful bureaucracy at Washington. They believe that liberty, free government, government that responds to the will of the people, government in which the will of the people finds expression in law, so that the law commands the respect and support of the people—is possible in a country of vast area and varying conditions only when the government is very decentralized, so that the local sentiment may prevail in the greatest possible number of matters. They fear and abhor the slow and gradual increase of the Federal power with its concomitant deterioration of the state governments. They believe that all abuses can be remedied by state action, if the proper efforts are made in that direction. They dislike to see the professional reformers turn to Washington, claiming they can get no action from the states. They believe it is more important to remedy abuses by the proper remedy, by a remedy which does not do harm to our institutions and to the future of our country in applying it, than it is to remedy them quickly.

So it is a great public question, one of the greatest now before this country, one of the most enduring controversies, one of the most comprehensive.

LAMAR T. BEMAN.



## GENERAL DISCUSSION

### A GENERAL VIEW<sup>1</sup>

In the Constitution of the United States certain rights are guaranteed to the various commonwealths of the union—among the more important of which are the right to a republican form of government, the right to territorial integrity, and, most significant of all, the right of jurisdiction in all matters not given to the national government, reserved to the people, or forbidden to the states in the Federal Constitution.<sup>2</sup> These states rights have existed ever since the formation of the union and they will survive as long as the Federal form of government is maintained.

From the very inception of the United States, however, there has been, continual strife over the nature of the union and the division of power between the forces of centralization and the friends of local self-government—a jealous feud between the advocates of nationalism and the defenders of sectional interests. No element of the established system has been defended with more assiduity and energy of conviction than states rights, and none with less success. Since the World War, however, this time-honored dispute seems to have entered a new phase. When the doctrine of states rights had apparently lost its force and the country was headed pell-mell for nationalism, the old bogey has been revived and restored

<sup>1</sup> By John Ely Briggs. *Iowa Law Bulletin*. 10: 297-312. May, 1925.

<sup>2</sup> States rights specifically guaranteed in the United States Constitution include also the right to choose senators, representatives, and presidential electors; the right to equal suffrage in the Senate; the right to ratify constitutional amendments; the right to protection against invasion and domestic violence; and the right to refuse to be sued by individuals. United States Constitution, art. i, sec. 2; art. iv, sec. 3, 4; art. v; and Amendments xi, xii, xvii.

to the vigor of former times. It is this reassertion of the states rights position in respect to new conditions that is of peculiar interest at present and makes a reappraisal of the traditional doctrine pertinent.

"The problem of states rights is inherent in our Federal system of government; it is the inevitable concomitant of the attempt to reconcile national control with local self-government. In a sense the Revolutionary War may be regarded as a victory of the colonies in their struggle for local autonomy against rule by Parliament. That success was codified in the Articles of Confederation, creating a form of government which allowed so much state freedom and independence that the central government was impotent. It then became the task of the framers of the Federal Constitution to devise a scheme of government that would harmonize unified central control with state sovereignty—a problem the British government and the American states had failed to solve.<sup>1</sup> How well the fathers of the Constitution succeeded is attested by the fact that the foundation they laid has weathered the stress of the Civil War and a hundred and thirty-five years of continual strain.

The system of government established by the Constitution is Federal in form; that is to say, the powers of government are divided between the national government and the states.<sup>1</sup> But from the beginning the determination of the exact sphere of authority vested in each of the two governments has puzzled American statesmen.<sup>2</sup> The whole difficulty might have been avoided if

<sup>1</sup> *United States Constitution*, Amendment x. The classic case on this point is *McCulloch v. Maryland*, 4 Wheat. 316 (U.S. 1819). Other leading cases are *Collector v. Day*, 11 Wall. 113 (U.S. 1870); *Kansas v. Colorado*, 206 U.S. 46, 27 Sup. Ct. 655 (1907); and *McClurg v. Silliman*, 6 Wheat. 598 (U.S. 1821). See also Willoughby, *Fundamental Concepts of Public Law*, chs. 13, 14; Burgess, *Political Science and Constitutional Law*, p. 1.

<sup>2</sup> See Madison's view in *The Federalist*, No. 39. The controversy over strict and liberal construction of the Constitution involves the division of power between the national and state governments. The liberal view early became the established policy of the Supreme Court and received expression in *Martin v. Hunter's Lessee*, 1 Wheat. 304 (U.S.

James Wilson's doctrine of inherent powers had been adopted, whereby, in case of uncertainty, the national government might assume jurisdiction by virtue of the authority naturally possessed and normally exercised by a national government.<sup>1</sup> The doctrine, however, was too extreme for people who had not heard of implied powers, and it has not yet been accepted, although the nationalists two decades ago were preaching the same idea in less alarming terms.

The Constitution, as submitted to the states for ratification, was silent on the vital question of the division of power between the national government and the states. Five of the states (Massachusetts, New Hampshire, Virginia, North Carolina, and South Carolina) therefore proposed that an explanation be added. Accordingly James Madison included such a proposition among the

1816); *Gibbons v. Ogden*, 9 Wheat. 1, 188 (U.S. 1824); *Lane County v. Oregon*, 7 Wall. 71 (U.S. 1868); *Trade Mark Cases*, 10 Otto 82 (U.S. 1879); *Brown v. Walker*, 161 U.S. 591, 16 Sup. Ct. 644 (1896); *Fairbank v. United States*, 181 U.S. 283, 21 Sup. Ct. 648 (1901); and *Matter of Strauss*, 197 U.S. 324, 25 Sup. Ct. 535 (1905).

<sup>1</sup> Mr. Wilson stated his position best in his famous argument in defense of the corporate existence of the Bank of North America. "The United States," he said, "have general rights, general powers, and general obligations, not derived from any particular states, nor from all the particular states, taken separately; but resulting from the union of the whole," and a moment later concluded that "whenever an object occurs, to the direction of which no particular state is competent, the management of it must, of necessity, belong to the United States in Congress assembled. There are many objects of this extended nature." 1 *Andrews Works of James Wilson*, p. 558.

While this idea may have been the basis of Marshall's reasoning in support of implied powers, Wilson defined the sphere of national authority more broadly than the Chief Justice found necessary. In *Cohens v. Virginia*, 6 Wheat. 264, 414 (U.S. 1821), for example, Marshall was content to declare that the national government was supreme as to the objects delegated to it and must possess power necessary to attain the objects legitimately within its control. The possession of such power must be the inescapable implication, he thought. This position falls short of inherent power.

There is considerable opinion, however, that the legal tender acts of Congress, upheld by the Supreme Court, exceeded implied powers. Justice Strong stated, "That would appear, then, to be a most unreasonable construction of the Constitution which denies to the government created by it, the right to employ freely every means, not prohibited, necessary for its preservation, and for the fulfilment of its acknowledged duties." And Justice Bradley in a concurring opinion was even more outspoken. "Such being the character of the General government," he wrote, "it seems to be a self-evident proposition that it is invested with all those inherent and implied powers which, at the time of adopting the Constitution, were generally considered to belong to every government as such, and as being essential to the exercise of its functions." *Legal Tender Cases*, 12 Wall. 533, 556 (U.S. 1870).

amendments he proposed in the first session of the first Congress, and in a slightly modified form it became the Tenth Amendment which reads: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people."<sup>1</sup> There is the cornerstone of the states rights edifice.<sup>2</sup> The whole controversy over the proper activities of the national government rests upon the Tenth Amendment.<sup>2</sup>

During the first seventy-five years of our national existence the problem of the division of power between the states and the central government was further complicated by some uncertainty as to the nature of the union. The question arose as to whether the United States was a Federal republic, as its founders called it, or a confederacy, as some people claimed they intended—whether political sovereignty resided in the nation as a whole and was exercised through the national gov-

<sup>1</sup> *Annals of Congress*, 1st Congress, 1st session, cols. 440-68, 809, 948.

<sup>2</sup> The following is a list of decisions of the Supreme Court during the last fifty years dealing with the Tenth Amendment: *Clafin v. Houseman, Assignee*, 93 U.S. 130 (1876); *Inman Steamship Company v. Tinker*, 94 U.S. 238 (1876); *United States v. Fox*, 94 U.S. 315 (1876); *Tennessee v. Davis*, 100 U.S. 257 (1879); *Civil Rights Cases*, 109 U.S. 3, 3 Sup. Ct. 18 (1883); *Gordon v. United States*, 117 U.S. 697 (1864); *Spies v. Illinois*, 123 U.S. 131, 8 Sup. Ct. 21 (1887); *Pollock v. Farmers' Loan & Trust Co. (Income Tax case)*, 157 U.S. 429, 15 Sup. Ct. 673 (1895); *Forsyth v. Hammond*, 166 U.S. 506, 17 Sup. Ct. 665 (1897); *St. Anthony Falls Water Power Co. v. St. Paul Water Commissioners*, 168 U.S. 349, 18 Sup. Ct. 157 (1897); *Missouri, K. & T. Ry. Co. v. Haber*, 169 U.S. 613, 18 Sup. Ct. 488 (1898); *Hancock Mut. Life Ins. Co. v. Warren*, 181 U.S. 73, 21 Sup. Ct. 535 (1901); *Kansas v. Colorado*, 185 U.S. 125, 22 Sup. Ct. 552 (1902); *Andrews v. Andrews*, 188 U.S. 14, 23 Sup. Ct. 237 (1903); *Giles v. Harris*, 189 U.S. 475, 23 Sup. Ct. 639 (1903); *Northern Securities Co. v. United States*, 193 U.S. 197, 24 Sup. Ct. 436 (1904); *Turner v. Williams*, 194 U.S. 279, 24 Sup. Ct. 719 (1904); *McCray v. United States*, 195 U.S. 27, 24 Sup. Ct. 769 (1904); *Central of Georgia Ry. Co. v. Murphey*, 196 U.S. 194, 25 Sup. Ct. 218 (1905); *Matter of Heff (Indian)*, 197 U.S. 488, 25 Sup. Ct. 506 (1905); *South Carolina v. United States*, 199 U.S. 437, 26 Sup. Ct. 110 (1905); *Jack v. Kansas*, 199 U.S. 372, 26 Sup. Ct. 73 (1905); *Hodges v. United States*, 203 U.S. 1, 27 Sup. Ct. 6 (1906); *Kansas v. Colorado*, *supra*, note 2; *Prentiss v. Atlantic Coast Line*, 211 U.S. 210, 29 Sup. Ct. 67 (1908); *Keller v. United States*, 213 U.S. 138, 29 Sup. Ct. 470 (1909); *Adams Express Co. v. Kentucky*, 214 U.S. 218, 29 Sup. Ct. 633 (1909); *Western Union Tel. Co. v. Chiles*, 214 U.S. 274, 29 Sup. Ct. 613 (1909); *Holmgren v. United States*, 217 U.S. 509, 30 Sup. Ct. 588 (1910); *Zakonaite v. Wolf*, 226 U.S. 272, 33 Sup. Ct. 31 (1912); *Hammer v. Dagenhart*, 247 U.S. 251, 38 Sup. Ct. 529 (1918); *Whipple v. Martinson*, 256 U.S. 41, 41 Sup. Ct. 425 (1921); *Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 42 Sup. Ct. 449 (1922).

ernment or whether it resided in the several states. If the states were sovereign they could withdraw from the union or refuse to obey national legislation at will, while if they were not sovereign, secession and nullification would be illegal. The Civil War demonstrated that state sovereignty is not a states right and never was under the Constitution.

“Political sovereignty, we now believe, resides with the people of the nation. The national government and state governments are only *legally* sovereign; that is, they are merely agents who exercise some of the powers that arise from sovereignty. To the powers or attributes of sovereignty assigned by the United States Constitution to the states, the state governments have an absolute right, depending of course upon the restrictions in the state constitutions. But to sovereignty itself neither the states nor the state governments have any claim.” The expression “*these* United States,” so eloquent in the days of the Declaration of Independence, lost its significance long ago but it still recurs occasionally like a recessive congenital characteristic, a startling reminder of our political ancestry.

Strict observance of terminology and the actual nature of the union would exclude consideration of state sovereignty from a discussion of states rights, but the fact that state sovereignty was for so many years thought to be a right gives some historical justification for a little further comment. Only once has the assertion of the dogma of state sovereignty had a decisive positive effect upon the American political system. The Eleventh Amendment, added to the Constitution in 1794, is based on the idea that a state, being sovereign, cannot be sued

<sup>1</sup> This view is very clearly stated by D. G. Ritchie in his article on the “Conception of Sovereignty” in *Annals of the American Academy of Political and Social Science*. 1: 385-411; Lieber. *Political Ethics*, sec. 65; Cooley, *Constitutional Limitations*, 3 ed., p. 598; Jameson, *The Constitutional Convention*, p. 21 and his essay on national sovereignty in *Political Science Quarterly*. 5: 193-213; and the argument of Daniel Webster in the case of *Luther v. Borden*, 7 How. 1 (U.S. 1849).



without its consent. The frank declaration of Justice James Wilson, who wrote one of the opinions in the case of *Chisholm v. Georgia*, that "Georgia is *not* a sovereign state" alarmed the states whose "claim soared so high" and they hastened to secure the only reduction of power ever suffered by the national government.<sup>1</sup>

Probably the Eleventh Amendment has been salutary on the whole. At least there was only one attempt in ninety-five years to rescind it.<sup>2</sup> To illustrate the incompatibility of the state sovereignty principle upon which it was based with the accepted idea of national sovereignty is relatively easy, however. After the Civil War the southern states borrowed enormous sums of money, much of it in England, to build railroads and establish banks. Neither the principal nor interest has been paid and the Eleventh Amendment effectively prevents collection by the foreign creditors through the United States government which is the only agency with whom their own government is permitted to negotiate a settlement.<sup>3</sup>

The futility of the idea that a state had a right to nullify an act of the national government, on the ground of unconstitutionality or for any other reason, was demonstrated in 1833.<sup>4</sup> Such clear-thinking states-

<sup>1</sup> *Chisholm v. Georgia*, 2 Dall. 419, 457 (U.S. 1793).

<sup>2</sup> In 1883 Representative William R. Moore of Tennessee introduced a resolution to rescind the Eleventh Amendment and to empower Congress "to provide by appropriate legislation for the legal enforcement of the obligation of contracts entered into by any of the States of the Union." The resolution was never reported from the committee on the judiciary. *Congressional Record*, 47th Congress, 2nd Session. Vol. 14, p. 1356.

<sup>3</sup> Efforts have been made to circumvent the repudiation of state debts. In 1879 the New Hampshire legislature passed a statute permitting a citizen of that state to assign to the state for collection any bonds issued by another state and unpaid. In 1880 New York passed a similar statute. When these states undertook to collect from Louisiana, however, the attempt failed. *New Hampshire v. Louisiana* and *New York v. Louisiana*, 108 U.S. 76, 2 Sup. Ct. 176 (1883). See also *Hans v. Louisiana*, 134 U.S. 1, 10 Sup. Ct. 504 (1890).

<sup>4</sup> The occasion was the South Carolina ordinance declaring the tariff acts of 1828 and 1832 to be "null, void, and no law, nor binding upon this state, its officers, or citizens." To this President Jackson replies in his vigorous proclamation denying the right of nullification and Congress passed a law authorizing the use of military force if necessary to collect revenue. South Carolina rescinded the nullification ordinance on March 15, 1833. H. V. Ames, *State Documents on Federal Relations*, No. IV, p. 37-41, 56.



men as Alexander Hamilton<sup>1</sup> Stephens pointed out the anomaly of a state remaining in the union and at the same time refusing to permit the enforcement of the general law within its borders.<sup>1</sup>

The decisive test of state sovereignty would be the right of secession. If a state could withdraw from the union it could by that means determine for itself the extent of its own obligations. But when several states joined issue in attempting to secede the will of the nation prevailed against them. Just before and even during the Civil War several ingenious schemes were proposed to provide a constitutional method of secession, whereby state sovereignty would have been recognized and the nature of the union would have been diametrically changed.<sup>2</sup>

The doctrine of states rights as distinguished from state sovereignty has developed out of opposition to the liberal construction of the Constitution with reference to the powers of the national government. The potency of "implied powers" was foreseen early and several unsuccessful attempts were made in the first session of Congress to have the Tenth Amendment read, "The power not *expressly* delegated" to the national government should be reserved to the states or to the people.<sup>3</sup> But Congress almost immediately adopted the policy of construing its powers to include those implied as well as

<sup>1</sup> See 1 Stephens, *A Constitutional View*, p. 421.

<sup>2</sup> For example, on December 17, 1860, Daniel E. Sickles of New York presented a resolution to amend the Constitution, providing that "Whenever a convention of delegates chosen in any state by the people thereof under the recommendation of its legislature, shall rescind and annul its ratification of the Constitution, the President shall nominate and, by and with the advice of the Senate, shall appoint commissioners, not exceeding three, to confer with the duly appointed agents of such state, and to agree upon the disposition of the public property of the United States lying within such state, and upon the proportion of the public debt to be assumed and paid by such state; and upon the approval of the settlement agreed upon by the President and its ratification by two-thirds of the Senate present, the President shall forthwith issue his proclamation declaring the assent of the United States to the withdrawal of such state from the Union." The proposal was not reported from the committee to which it was referred. *Congressional Globe*, 36th Congress, 2d session, p. 107.

<sup>3</sup> 1 *Annals of Congress*, 1st Congress, 1st session, cols. 790, 797.

those expressed. From the time the First Bank of the United States was established in 1791 to the present day Congress has attained surprising ends by means of reasoning as devious as the story of the House that Jack Built.

Nor was the judicial branch of the national government far behind. In 1803 the Supreme Court exercised the power of passing upon the constitutionality of an act of Congress, a power hitherto claimed by the states and assumed by the Supreme Court on the basis of logic rather than any expressed authority in the Constitution.<sup>1</sup>

As for the executive branch of the national government, history is full of instances of liberal construction from Thomas Jefferson's purchase of Louisiana for 4 cents an acre to Calvin Coolidge's release of a Chicago bootlegger convicted of contempt of court.<sup>2</sup> In the face of the effect of liberal construction which so elastically enhances the power of the national government, it is not surprising that states rights have been invoked in behalf of strict construction.

✓ It is a mistake to suppose that the states rights interpretation of the Constitution has been confined to a particular section of the country or to the Democratic Party. Almost every state in the union has at some time or another asserted that the national government was exceeding its authority and encroaching upon the rights of the states.<sup>1</sup> Witness the Kentucky and Virginia resolutions, the protest of Massachusetts against the embargo of 1809, the objections of Pennsylvania and Virginia against rechartering the First Bank of the United States in 1811, the Hartford Convention in 1814, legislative action of many of the northern states to frustrate the Fugitive Slave Act of 1850, and in 1919 Rhode Island's

<sup>1</sup> *Marbury v. Madison*, 1 Cranch 137 (U.S. 1803). See also E. S. Corwin, "Constitution v. Constitutional Theory," *American Political Science Review*. 19: 290-304.

<sup>2</sup> See *Ex Parte Grossman*, 45 Sup. Ct. 332 (1925).

appeal to the Supreme Court challenging the binding force of the Eighteenth Amendment upon a state that did not ratify it.<sup>1</sup> While the jurisdiction of the national government has expanded with unprecedented rapidity since the Civil War, the many protests against the centralizing tendency have not come so often from the state governments in the name of the commonwealth as from interested parties in every section of the country who have hoped to turn public opinion against the general drift of events.

As a rule the political party in power has favored expansion of national control while the party out of power has usually advocated strict construction. Since 1860 the Republicans have been in office most of the time, so the Democrats, as the opposition, have been constrained to champion the states rights, strict construction policy. Yet when they have been in power they have rather outstripped the Republicans. Grover Cleveland, for example, set the precedent of using United States troops to maintain order in Illinois without the state's consent<sup>2</sup> and during the administration of Woodrow Wilson the national government proceeded to regulate wages on the railroads, to loan money to farmers, to operate the means of transportation and communication, and to fix the price of food and fuel—all without amending the Constitution. And those who opposed this legislation sought the shelter of states rights, not because they were so wedded to the principle of local self-government or so fearful of the destruction of the Federal system of government, but because the states rights dogma served their selfish interests better for the moment. Economic or other sectional advantage has always been the chief motivating influence back of both liberal and strict construction of the Constitution.

<sup>1</sup> See the very valuable series of booklets entitled *State Documents on Federal Relations*, edited by Herman V. Ames.

<sup>2</sup> On the occasion of the Pullman strike in 1894.

The states rights idea is characteristically negative. Almost invariably states rights have been urged *against* some proposed measure. The doctrine has been exploited in opposition to a national bank, the protective tariff, territorial expansion, the abolition of slavery, the regulation of industry, Federal aid, and the protection of public health. In fact almost every advance in governmental activity has been resisted in the name of states rights. The reason for this is simple. The United States has been growing into a nation. Our most important problems have been nationwide, so that the national government, as the proper instrument for coping with such problems, has naturally been the aggressor. If the irresistible tendency of the times had been in the direction of sectional development, states rights would have been a positive doctrine and the nationalists would have taken the negative position. For instance, when the states rights faction undertook to establish the Confederate States of America the nationalists waged a defensive war in opposition.

And it is a significant fact that the confederates discovered within a year that states rights was not a constructive idea. In spite of a specific declaration in the confederate constitution that the states were acting in their "sovereign and independent character" the central government at Richmond found it necessary to exercise power it had no express authority to use. The sovereign states meanwhile were confronted with the alternative of seceding from the Confederacy and being forced back into the union or of swallowing their beloved principle of states rights and becoming parties to centralization in Richmond instead of Washington.<sup>1</sup>

Another feature of the states rights doctrine, which has already been suggested, is its symbolism. The idea

<sup>1</sup>See N. W. Stephenson, "The Confederacy Fifty Years After." *Atlantic Monthly*, 123: 750-5. June, 1919, for a critical analysis of the situation in the light of history.

has partaken more of the nature of a sign of general reaction than it has of a self-sufficient principle. There has been no end of oratory and rhetoric in the name of states rights. The halls of Congress have continually reverberated with eloquent speeches in behalf of the sovereign states and the sacred principle of local self-government. But seldom indeed has anything been done about it. And the reason seems to have been chiefly this: that it is usually easier and safer to debate a proposed measure in generalities than upon its intrinsic merits. Thus opponents of the tariff, of the abolition of slavery, of equal suffrage, of national prohibition, and of the abolition of child labor have invariably resorted to states rights as the most available argument against legislation which public opinion has regarded as meritorious in itself.

And so the doctrine of states rights has become a shibboleth, a mere watchword of opposition to nationalism. It is only the shadow of the substance of concrete problems. The principle has been invoked so often as a means to an end that it has apparently lost its force as an end in itself. It has been aptly described as a fetish. The idea has indeed been regarded as potent for any occasion, a sort of talisman of political security wherein dwells the spirit of *status quo*.

States rights deserve a better fate than this lip service. As a matter of fact the principle lies at the very foundation of our system of Federal government. It is as important today as it ever was. The preservation of powers reserved to the states is vital to the continued existence of the dual form of government which was so well adapted to conditions and political ideas at the time it was established that it won the admiration and emulation of statesmen everywhere. That the American people, in spite of their nationalistic tendencies will ever consent to the destruction of the states or the abandonment of the Federal system is very unlikely. While

some functions may shift to meet the needs of social and economic progress, there must always remain an extensive sphere of political control that can be exercised best by local authorities. In a country as large as the United States conditions, opinions, and interests vary so greatly that complete national control would be sure to work hardship and run counter to public opinion in some localities. The results of the votes on some of the referenda in the 1924 election will serve to illustrate this diversity. Texas favored pensions for soldiers while in Montana, Colorado, and Kansas bonuses were defeated. Kentucky defeated an appropriation of \$75,000,000 for road building but Illinois approved of the expenditure of \$100,000,000 for that purpose. Missouri adopted a gasoline tax and Massachusetts defeated a similar measure.<sup>1</sup>

In our zeal for centralization and efficiency there has been a tendency to lose sight of the fact that the states do have rights. Expediency has quite overshadowed the principle of federalism. The steady development of nationalism and the unfortunate history of states rights due to the futility and insincerity of their assertion has created the notion that the doctrine of states rights is a dead issue. Though the states have declined in power they have not fallen, and recently the trend of events has awakened a new interest in the position of the states in the Federal system.

The first quarter of the twentieth century has been a period of unprecedented extension and complication of social and economic relations in the United States. Commercial and business organization, having already overstepped local limits, has become regional or national in scope. With better facilities for communication, disease spreads more readily so that public health has become a national problem. Industrial unrest likewise has no

<sup>1</sup> See W. A. Robinson, "New Laws Voted on November 4, 1924." *Current History*. 21: 841-3.



respect for state lines. A national consciousness has developed which has swept within the purview of the national government objects for regulation that have hitherto been regarded as exclusively local in character. In 1907 a committee of the House of Representatives reported that Congress had no jurisdiction over child labor, yet within a decade just such legislation was enacted, although later declared unconstitutional by the Supreme Court.<sup>1</sup> In the same manner the national government has set up standards of purity of food, has presumed to settle industrial disputes, has tried to prevent combinations in restraint of trade, has prohibited the manufacture and sale of intoxicating liquor, and in respect to regulation of the railroads has practically ignored the existence of the states and paused just short of denying them even the power of taxing common carriers.<sup>2</sup>

All of this extension of national authority has been under the guise of a paramount necessity and in the name of good government. By and large the results have been beneficial. Everyone has recognized the need of action, and since the efforts of the states have been ineffectual people have naturally turned to the national government. In the language of Theodore Roosevelt, the national power should be invoked "with absolute freedom for every national need," and he conceived of the Constitution as "the greatest document ever devised by the wit of man to aid a people in exercising every power necessary for its own betterment, and not as a straight-jacket cunningly fashioned to strangle growth." In Alexander Hamilton's time nationalism was based

<sup>1</sup> House Committee Reports, 59th Congress, 2nd session II, No. 7304. See cases cited in note 2, p. 22.

<sup>2</sup> See *Minnesota Rate Cases*, 230 U.S. 352, 33 Sup. Ct. 729 (1913); *Houston Ry. v. U.S.* 234 U.S. 342, 34 Sup. Ct. 833 (1914); *Wisconsin v. Chicago, B. & Q. Ry.*, 257 U.S. 563, 42 Sup. Ct. 232 (1922).

<sup>3</sup> Quoted in Hagedorn, *Roosevelt: Prophet of Unity*, p. 86.

upon distrust of the people; now it seems to have become the favorite channel of expressing the popular will.

The crux of the situation is that socially and economically the states are antiquated political areas—they are no longer social and economic units. A particular industry has its own regional bounds, and industrial problems are either of municipal concern or exceed state competence. It is significant that the national government in the Federal Reserve Act, the Federal Farm Loan Act, and the Transportation Act has frankly recognized the artificiality of state lines and organized on a regional basis. An Iowa farmer does business with the Federal Farm Loan Bank in Omaha, not in Des Moines, and the Illinois farmer must go to St. Louis instead of Chicago. Even the states have found it necessary to make treaties among themselves in order to handle such domestic affairs as irrigation.<sup>1</sup>

Recent tendencies are not all in the direction of centralization however. During the World War a number of the states made discouragement of enlistments in the United States military forces a grave offense involving severe penalties. In the case of *Gilbert v. Minnesota*, Chief Justice White and Justice Brandeis thought that the act of Congress on the subject of discouraging enlistments occupied the whole field and left no room for state legislation, but the Supreme Court decided that the subject was within the jurisdiction of the states.<sup>2</sup> Two other instances in which the Supreme Court has recently leaned heavily in the direction of states rights are better known. In 1918 the first national child labor law was declared unconstitutional because the subject was solely within state authority, and in 1922 a tax upon the pro-

<sup>1</sup> E. L. Hampton, "The Seven State Irrigation Treaty." *Current History*. 17: 990-1002.

<sup>2</sup> *Gilbert v. Minnesota*, 254 U.S. 325, 326, 334, 41 Sup. Ct. 125 (1920).



ducts of child labor was also held to be beyond the competence of Congress.<sup>1</sup>

Nor is the Supreme Court alone in defending states rights. The reaction against the increasing authority of the national government is widespread. As reflected in newspaper comment and periodical literature there seem to be two outstanding causes: first, the national control of state activities through the system of "Federal aid"; and second, the character of the Eighteenth Amendment and the proposed child labor amendment.

The current practice of subsidizing the states began in 1862 when public lands were granted to several states, including Iowa, to be used for the establishment and maintenance of colleges of agriculture and mechanic arts. That measure raised a storm of protest at the time. "It is using the public lands as a means of controlling the policy of the state legislatures," declared a senator from Virginia. "It is an unconstitutional robbery of the Treasury for the purpose of bribing the states." But the policy prevailed.<sup>2</sup> It was a short step from land grants to cash payments. Gradually the subsidies were increased and the national government assumed greater supervisory powers. During the past decade the states have faced a terrific demand for better schools, better roads, and more protection of health and property, and at the same time an equally insistent demand for tax reduction. In this dilemma the United States Treasury was discovered to be one of the most prolific and painless sources of revenue. No state is legally compelled to match dollars with the United States government, but the prospect of having \$2 to spend for every \$1 appropriated is too alluring to resist, while the thought of contributing revenue for Federal aid in other states without sharing in the windfall is intolerable. So

<sup>1</sup> *Hammer v. Dagenhart*, 247 U.S. 251, 38 Sup. Ct. 529 (1918); *Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 42 Sup. Ct. 449 (1922).

<sup>2</sup> 12 U.S. Stat. at L. 502; *Congressional Globe*, 35th Congress, 2nd session, 718.

the states have readily agreed to the terms of national supervision.<sup>1</sup>

The high standards imposed have been commendable, but the government at Washington has not been slow to use this weapon of enchancing its power and establishing national policies in local fields over which the Constitution denied it any measure of control. And now the reaction in the name of states rights has set in. Probably the realization that Federal aid in the fiscal year of 1924 cost nearly 5 per cent of the total expenditures of the national government—approximately \$145,000,000 (more than half of the disbursements for purposes not connected with past or future wars)—has as much to do with the reversal of popular opinion as any sincere resentment at the invasion of state jurisdiction. When President Coolidge noticed an item of \$109,000,000 for Federal aid in the budget for 1926 his economical instincts impelled him to tell Congress of his conviction that this expenditure could be curtailed, that “the broadening of this field of activity is detrimental both to the Federal and state governments. Efficiency of Federal operations is impaired as their scope is unduly enlarged. Efficiency of state governments is impaired as they relinquish and turn over to the Federal government responsibilities which are rightfully theirs. I am opposed to any expansion of these subsidies,” he declared.<sup>2</sup>

The revolt against national prohibition has been most effective as expressed in terms of Federal usurpation. A great many people who have no sympathy for intemperance and no taste for alcoholic beverages are nevertheless bitterly opposed to the Eighteenth Amendment. They regard it as a dangerous encroachment upon states rights—the entering wedge for further interference by the national government. They predict that the precedent will be followed by other amendments of similar

<sup>1</sup> See Macdonald, *Federal Subsidies to the States*.

<sup>2</sup> Message of the President transmitting the Budget, 1924.

character until the states will have dwindled into insignificance and purely local, domestic affairs will be handled at long range by an unsympathetic and misunderstanding bureaucracy. They witness the multiplication of bureaus, clerks, agents, and inspectors, and they are tempted to quote the Declaration of Independence in reference to King George III: "He has erected a multitude of new offices, and sent hither swarms of officers to harass our people, and eat out our substance." In the pending child labor amendment and the proposed marriage and divorce amendment they think they see the vindication of their fears.

The income tax, prohibition, and child labor amendments are essentially different from any of the others in that they distinctly extend the powers of Congress. Other amendments, such as the Thirteenth, Fourteenth, Fifteenth, Seventeenth, and Nineteenth, clearly detract from the powers reserved to the states in the original Constitution, but they expand primarily the rights reserved to the people rather than the authority delegated to the national government—albeit enforcement has naturally been vested in the national government. The prohibition amendment, however, not only thrusts national control into the sphere of state jurisdiction but it invades the realm of individual liberty as well. The same would be true of the child labor amendment if it is ever ratified. The recent action of the states in rejecting the amendment has been caused more by opposition to expanding the power of Congress into the province of state jurisdiction and the rights reserved to the people than by any defense of child labor. The action of the people of Massachusetts in recommending rejection by a two-thirds majority vote cannot be construed as favoring repeal of the state legislation on the subject.

So the old problem of reconciling centralization with self-government remains a puzzle. The framers of the

Constitution assigned to the national government power commensurate with national functions in 1787, and left to the states the affairs which seemed to be so domestic and personal in character that only local agencies thoroughly familiar with conditions would be competent to govern. Their idea was to solve the problem by centralizing control of national affairs and maintaining self-government in local matters.<sup>1</sup> Now the force of circumstances has placed the states in a false position. Affairs that were local, and thus properly subject to state jurisdiction, have become regional or national, and while the states still have the legal power of control their action is ineffectual—a plight that has pleased the seekers of privilege.

The remedy would seem to lie in a reapplication of the formula of the fathers: render unto the national government the things that are national and leave with the states the things that are local, even though the power of the national government be magnified greatly. The aggrandizement of the central government need not be at the price of autonomy. Centralization is not necessarily incompatible with self-government, but if it were the bulk of governmental activities will always remain local in character and thus peculiarly adapted to autonomous regulation. The transfer of power from the states—power which they are unable to use effectively—is not inimical to our Federal system or to republican institutions whether accomplished by judicial interpretation or by formal amendment. Amendment, of course, has the advantage of silencing charges of usurpation. It is not the original division of particular powers in the Constitution that is important, but the principle which determined the division.

The difficult part is to decide when a problem has overleaped state boundaries and become of national concern. Albert J. Beveridge proposed the rule:

<sup>1</sup> *The Federalist*, No. 17.

"When an evil or a benefit is so widespread that it affects so much of the country as to be called national, the *nation's* power should be equal to end that evil or secure that benefit to the American people."<sup>1</sup> James Wilson, than whom there was no abler statesman in the Constitutional Convention, declared: "Whatever object of government is confined to its operation and effects within the bounds of a particular state, should be considered as belonging to the government of that state; whatever object of government extends in its operation or effects beyond the bounds of a particular state, should be considered as belonging to the government of the United States."<sup>2</sup>

A satisfactory decision in each instance would seem to depend upon several considerations:

Is local autonomy vital to equitable regulation?

Is the matter commonly beyond effective state control?

Would uniformity of state laws be sufficient?

Is the matter so definitely regional as to be handled by treaty relations among the states concerned?

Is public opinion crystallized in favor of national action? When answers to these queries clearly point to the desirability of national jurisdiction, let states rights be modified to meet the needs of the times.

## THE CONFLICT OF ADMINISTRATION<sup>3</sup>

In a letter to the governors of the states, at the close of the Revolutionary War, Washington fervently prayed for four things, which he humbly conceived as not only essential, but actually vital, to the existence of the United States as an independent power. These four things

<sup>1</sup> Quoted in *American Review of Reviews*. 35: 483.

<sup>2</sup> 1 Andrews, *Works of James Wilson*. p. 533.

<sup>3</sup> By Frank L. McVey. *Popular Science Monthly*. 80: 142-50. February, 1912.

were: an indissoluble union of the states under one Federal head; a sacred regard for public justice; the adoption of a proper peace establishment; and the prevalence of a civic and friendly disposition among the people of the United States which will induce them to forget their local prejudices and policies, to make those mutual concessions which are requisite to the general prosperity, and in some instances to sacrifice their individual advantages to the interest of the community.

None of the revolutionary fathers could see difficulties other than those of a sea-coast commerce policed by many petty sovereigns. The problem of cooperation between the Federal authority and the states would, in their opinion, arise only when brought to the surface by a state jealous of its prerogatives, never through the action of the Federal authority. A hundred and twenty-five years have passed, and not only has the unexpected happened, but persons and corporations engaged in commerce seek the extension of Federal power at the expense of state authority, if need be, in order that commerce may go on unhampered and free from restrictions of a territorial character.

Men rang the bells in steeples and gave utterance to their jubilation in loud hurrahs when King George's fleet left New York harbor. They had forgotten that a nation did not exist; that effective cooperation had ceased when Washington disbanded his army in 1783; that the union which was then dissolved existed only as a tradition, while the states were thirteen independent sovereigns, jealous of each other and open to the abuses of foreign intrigue. Thus at the beginning of the twentieth century in America has arisen a new type of problem in the conflict of administrations, solvable only by a process of cooperation.

Writing to Duane, Hamilton declared "the fundamental defect is a want of power in Congress. Three causes contribute to this misfortune. In the people a

jealous excess of the spirit of liberty, in Congress a diffidence of their own authority, and a want of sufficient means at their disposal." "The clear duty of Congress," declared Hamilton, "was to usurp powers in order to preserve the republic, but its courage stopped short of this solution, while the confederation as it stood was fit neither for war nor for peace."

The problem confronting the people of America in 1783 was the conversion of a voluntary league of states into a firm union. They needed to be first awakened to the necessity of organization and the adoption of a national policy; and after this the instrument of agreement must be drafted and the government established. It is not necessary at this time to discuss the detailed story of the Constitution's making. From the beginning of its inception, men took opposite views as to the rights of the individual states and the nature of the powers that should be given to the central government. Those who upheld the idea of states rights feared in their hearts the rule of the people. They argued for state representation in the national Congress while maintaining that Federal authority should be reduced to a minimum. The federalists, on the other hand, insisted upon a broad interpretation of the powers of the national government, thereby creating a controversy which furnished the basis of modern party relations, until materially modified by the tendency, brought about by the Civil War, to discuss the import of questions rather than functions of government. The same motive, however, which caused men to turn to the states in the earlier day now causes them, in a measure, to look to the Federal government, since it is believed that, in some degree at least, the rule of the people can be materially modified.

For a period of nearly thirty years after the Civil War government in the United States, both Federal and commonwealth, was used largely as an agency for the promotion of wealth. Special privileges came to over-



shadow common rights, and many problems were left untouched because in the opinion of the courts of the day the Federal government had no authority over them, and the states by the Constitution were not authorized to deal with such problems. But as industry has grown in immensity and spread its organization from commonwealth to commonwealth, producing a series of new problems in the movement of commerce from state to state, there has arisen a friction and questioned authority between the two branches of government in the United States. The Constitution of the United States provided that the states should have all the rights of government, with the exception of the right of secession, impliedly determined by the results of the Civil War, those powers which the Constitution expressly confers on the Federal government, and those which the Constitution withholds from the states. It did not take many years for shrewd lawyers to discover that there existed in the interpretations of the two court systems a "twilight zone," as it has been picturesquely put by one of America's party leaders.

The specific powers of the Federal government were determined narrowly, while the general powers of the state were interpreted specifically. There arose, as a consequence, certain types of problems, certain species of acts, to which no special law seemed to apply, which left their authors in the possession of concerns working in a no-man's-land. To meet this serious difficulty it has been proposed on one side that there shall be a marked increase of Federal authority which will deal with all such problems, and on the other there has been insistence that the sanctity of the Constitution shall be maintained, the sacredness of the judiciary upheld, and the doctrine of the division of powers kept intact.

Those who believe in an increase of Federal authority have maintained that the union is a Federal one, that the sovereignty of the states never existed, and that with



their present authority and power they are merely nuisances clogging the way of the Federal government. There is no question that a series of difficult problems have arisen which demand a wider interpretation of Federal authority, but the attitude just mentioned would result in the reduction of the states to mere local administrative units with no more power and authority than that possessed by a county or township. It is declared that the conservation of resources is so important that state lines ought not to be taken into consideration in dealing with the problem, while interstate commerce and the questions that are associated with it make it impossible, if we are to be a great commercial nation, to recognize that state authority over commerce and trade exists within certain boundaries.

Such, briefly stated, is the controversy; in its final solution the whole theory of American government is carried with it. In the course of the discussion it will be necessary to examine some of the experiences and outcomes of Federal legislation, and to present, if there be any other point of view, what can be done in the development of cooperation between the two branches of government rather than subordination of one as compared with the other.

Over and above every problem of a national character in its importance from the point of view of the public, stands, in all probability, that of interstate commerce. The legislation and various attempts at legislation in this connection cover a period of forty years. In the year 1872 Mr. Regan, a congressman from the state of Texas, presented a bill regulating interstate commerce carried on railways. The bill was the outcome of grievances and difficulties arising from the attempts of the various states to secure some betterment of transportation facilities, lower rates and better methods of carrying on the business. Annually for more than fifteen years this bill made its appearance in Congress, and it was not until

1887 that the interstate commerce act was passed regulating railroads and railroad rates. Despite the complaints that were made regarding the inefficiency of this law, and the difficulty of bringing under it many of the problems that arose, no other legislation took place until the year 1903, and since then the law has been modified in 1907 and 1910.

If we turn to the national bank act, which has been referred to many times as one of the most beneficent laws that the Federal government has put upon the statute books, it will be noted that it had its origin in the necessities of the Civil War, that it was developed as a revenue measure in the hope of forcing the banks of the day to buy the bonds of the distressed government. The principles which were recognized by the Secretary of the Treasury at the time as essential to the establishment of a banking system were taken in part from the experiences of Massachusetts and New York. Out of these came the right of free banking, the principle of the redemption fund, and the issue of paper money upon a bonded security, as important parts of the national bank act.

Passing in quick review the Federal legislation relating to pure foods, it will be found that not until 1906 was any legislation secured which authorized the inspection and examination of foods by Federal officers and placing upon adulteration an adequate penalty. For seventeen years the people of the nation had urged Congress to pass a bill that would meet the many abuses that had arisen in the adulteration of food and dairy products. The same story can be told about the tariff. Since the Civil War the different tariffs that have been enacted for the purpose of protecting manufacturers in the United States have steadily increased, and the percentage of the burden laid in the form of customs duty, regardless of the conflict of interests and the necessities of the consumer, has steadily augmented, until under the

provisions of the McKinley bill it stood at a higher percentage than at any time in the history of the nation.

Nor is this all. The encroachments upon the financial strength of the states, in the form of added taxes, have come with the growing activity of the Federal government, as might well have been expected. In the year 1909 the Federal corporation tax was laid upon all corporations engaged in interstate business in the United States. It had been urged that a large revenue would be secured by this form of tax levy; that it would give greater control over the many corporations of the country, making it possible to reorganize their book-keeping and accounting systems along the lines of the best principles of accountancy. The law has now been in existence about two years, and it has been shown clearly that it lays a heavy burden upon corporations in the impossible demands of the accounting methods required, while the principle of self-assessment, now unchecked by government examination, leaves it practically with the corporations to determine what they shall pay. But the worst side of the corporation tax is that the fiscal system of those states that have developed such a plan of taxation is materially affected. These states find that their own sources of revenue are cut into, while the corporations subject to this fiscal control are provided with an argument of double taxation against proper state taxes. This phase of the corporation tax has been regarded by many economic authorities as unfitting the tax for use by the Federal government, and its application has been denounced in many quarters as an invasion of the proper field of state taxation.

In the efforts now being put forth to establish a Federal income tax the same tendency is to be seen. While it cannot be denied that the Federal government should have the authority in time of need to levy a Federal income tax, yet it is distinctly questionable as to the wisdom of such a tax in time of peace for Federal purposes.

The problems which confront the states at the present time are indeed serious. Upon them fall all of the burdens of maintaining local government, and these, with the growth of wider ideas regarding the development of society, constantly tend to increase rather than diminish. The states are now called upon to develop extensive educational systems, to care for the insane, to punish criminals, to maintain courts, to preserve order, to build roads, and support the poor, beside erecting public buildings, and in the municipalities providing water, light, paving and the other necessary improvements of modern towns and villages. To have the Federal government, therefore, step aside and reach out into the states for additional funds for Federal support means interference with the states' fiscal systems and in the long run the weakening of their financial power. In the customs duties and the internal revenue, the Federal government has every facility to secure sufficient revenue for the conduct of its business.

What has already been said regarding the history of Federal legislation in connection with the interstate commerce act, the national bank act, the pure food and dairy legislation, and the tariff indicates clearly the slowness with which Congress meets the problems of legislation, and how difficult it is to secure modification of a law by a body so overwhelmed with legislation for a country as big as America. In nearly every instance the states began the legislation, and carried it forward to a point where it was necessary to look to Congress for some wider interpretation in order that relief might be given. The work which Congress has done, while commendable in many cases, shows clearly that it cannot act intelligently in every instance because of its distance from the problem, and that while it does work out in general some specific lines of action, it cannot by the very nature of things meet local needs.

Sixteen years after the introduction of the Regan bill came the Interstate Commerce Act, and for as many more no modification of the law was made, despite the insistent demands for such changes. The National Bank Act remained practically unchanged after the date of its passage until the year 1900. Examples of this kind go to show that Federal legislation is attended by many disadvantages. Undoubtedly Congress can deal with large problems on general principles, but on that very account it is often unwise for it to attempt to work out experiments and changes in the law.

It is just here that the states come to play an increasingly important part. They are in fact laboratories in which industrial and political experiments can be worked out on such a scale as to determine the value of the experiment. It means the relieving of the nation as a whole from many of the pangs necessary in the growth of democracy. It means the utilization of the best that comes from such experiments and the saving to the government of the loss of time and disappointment in carrying on large enterprises. The states have, as a consequence, an important governmental function to carry out. They are not to be regarded as mere administrative units, subject to the direction and domination of a Federal authority thousands of miles away, with no autonomy such as is found in the case of the departments in France; but they are rather constituent parts of the union, self-directive, and capable of maintaining their own autonomy and of carrying on their own functions within their own boundaries. To them we entrust our daily welfare, while to the Federal government are turned over our collective interests. Nevertheless, they are one and the same government, each a part of its frame, working together, but separately organized. To substitute one for the other is to violate the whole principle of the Federal scheme.

The conflict between the two is more apparent than real. The difficulties of the situation have been materially exaggerated, and not always without a purpose. In the early history of our nation many of the believers in states rights took that position because of their feeling that the government would not then be in the hands of the people, but would be only representative, and today that same feeling exists in the demand that the Federal authority be enlarged and the states reduced to minimum power in order that again the authority of the people may be hampered and limited. Much confusion of detail and of procedure clouds the issue. Underlying it all, the principle of action, both in state and Federal government, is the same. The law is founded on the common law of England, and there is to be discovered to the diligent inquirer a greater uniformity than diversity. The extent of this uniformity is marvelous. From one state to another have been handed on the principles of legislation and forms of government. In one state is initiated some new phase of political organization, its propagation is carried on into another community, and little by little there moves constantly over the land an increasing uniformity of legislation. While it may be said that as a nation we are face to face with serious industrial problems over which we have no central authority, nevertheless the nation has made some progress under present constitutional provisions and the states are diligently seeking legislation from other sources that will meet the difficulty. The danger is not from this direction, nor is it likely to arise from our failure to solve the problem in a fairly satisfactory way through the utilization of both state and Federal governments, but the danger, if from anywhere, is from a tendency seen now and then toward excessive centralization. It is not, however, from tyranny that we are likely to suffer, but rather from a breakdown in an organization too extended and too difficult of effective operation. There can be no question in

the minds of students of political history that the future of the nation depends upon the cooperation of the governmental units rather than upon the exaggeration of one of them. Instead of attempting to magnify the Federal government, there ought to be a marked movement toward the equalizing of the functions of both. Because of the extending of its authority over a large area, the Federal government is in a position to secure information on all topics for utilization in the various states.

An instance of this statement is found in the collection of data already undertaken by the different bureaus at Washington. With the authority of the national government behind them, they are able to bring together an immense amount of data that throws light upon many questions. To limit the functions of the Federal government to the mere collection of data is not in the mind of any one. A second step could be taken, one that is already being carried on, through the medium of investigation. Thus the collection of data should be supplemented by specific investigations of various matters of interest to the public welfare. Again this alone is not sufficient. Such information must be given publicity, and here the Federal government is in a position not only to give wide publicity to its own actions and the results of any investigations which it carries on, but is in a position to insist upon publicity on the part of all interstate corporations. Because of the conflict of authority in the field of commerce many suggestions have been made from time to time by which the Federal government is to take over full authority in the matter of incorporating such corporations. It is urged in behalf of this movement that many of the states now permit the incorporation of companies under peculiarly satisfactory provisions for the company, and that as a consequence the other states are not able to control them. There is considerable truth in this position. But the matter is comparatively easily disposed of. There is no reason



why Congress should not pass an act setting forth the conditions under which any corporation may engage in interstate commerce. These conditions would have reference to capitalization, publicity of accounts, and responsibility for any statements set forth regarding their business. Such a law would in no way necessitate incorporation or the disturbance of the incorporation of companies by the different states. But like the tax upon bank currency passed in 1866, it would have a marked effect in forcing corporations to comply with the Federal conditions, while at the same time allowing the states to modify the law so as to apply to the conditions peculiar to their own territory.

Many other instances might be cited in which the same relationships are to be found as in the case of the interstate corporations. The more one studies the situation, the more one is impressed with the fact that the relations between the states and the Federal government can be strengthened rather than weakened by the passage of laws on the part of Congress which will set forth the conditions under which business concerns can enjoy the privileges of carrying on their traffic between the different states, allowing the regulations to be developed by the commonwealth. It might be argued that this would still retain the worst features of present conditions, without discrimination and with lack of uniformity. But, an examination of the laws of the states will confirm the impression that the states are very rapidly taking over those regulations and laws which have been proved by the test of time to be satisfactory and efficient. Any limitations of the authority of a state like Wisconsin, where under the direction of an underlying public sentiment much progress has been made in working out a number of highly efficient methods of dealing with serious questions, would be unwise. It is very doubtful if the same progress could have been made



by the Federal government through the medium of legislation by Congress. •

The people of this country are interested in efficient administration. They are not insistant upon either Federal or state authority as such. What they want to see is progress in dealing with some of our serious national questions. But history proves that when a nation tries to cover too large a field and through its national legislative body to deal in detail with local questions, it fails to accomplish the result that was expected. In America we have a very fortunate divison of functions, at some points weak, but on the whole a satisfactory division of authority. To push the states down into the position of mere administrative units would result in the weakening of the whole plan of government and in a probable inefficiency because of the distance from central authority in dealing with governamental matters. ✓

Our attitude, then, in this great question of the conflict of administrations should be that of seeking for the full utilization of both Federal and state authority, for the elimination of friction between them, and for the securing of an adequate working plan by which both can be used to the best advantage. We are a nation of one people, believing distinctly in the Federal form of government. It remains, therefore, for us to insist upon a clear understanding as to the functions of the Federal government and a larger realization of the fact that the states are carrying the burden of the expense and difficulties of local problems, and that interference on the part of the Federal government is likely to result in an increasing weakness of authority rather than a strengthening of government. ✓

A century and a quarter have passed since the creation of the republic in 1787; the indissoluble union so fervently hoped for by the father of his country is now an accomplished fact; though the regard for justice can

hardly be referred to as high, nevertheless the nation is making progress steadily toward more efficient courts; our peace establishment meets the needs of the republic; and great advance has been made toward the civic and friendly disposition among the people of the United States, sufficient to induce them to forget their local prejudices and policies enumerated by Washington as the fourth desideratum. We have still the problem of Federal authority and the wise determination of what and how far the government should attempt to rule by central authority. The question is of vast importance; its determination will have much to do with the perpetuation of the republic.

### FEDERAL POWER AND THE PEOPLE<sup>1</sup>

The extension of the power and authority of the Federal government has been erroneously characterized as Federal usurpation. The dictionary definition of the word "usurpation" is "the act of seizing, or occupying and enjoying, the place, power, functions or property of another without right." This is not the situation as it exists in the United States today. Power and functions have been thrust upon executive officers, the visible impersonations of the Federal government, by the representatives of the people in Congress assembled. Hamilton very properly observed, in the *Federalist* papers, that the fabric of the American empire ought to rest upon the solid basis of the consent of the people; and if the people consent to grant large powers to the Federal government, those powers are legitimate and are not usurped.

Much of the Federal legislation enacted by Congress was based upon the doctrine of paramount necessity. This has not been, however, the only inspiring cause.

<sup>1</sup> By Henry Litchfield West. *Bookman*. 47: 525-37. July, 1918.

There has been in the minds of the people an instinct, selfish though it might be, which has led them to gain for themselves all possible advantage through the extension of governmental functions. No one can analyze the appropriations made by Congress without being impressed by the fact that the people, through their representatives, have insisted upon the Federal revenues being diverted into channels which would insure the greatest good to the greatest number. Even Thomas Jefferson, stalwart opponent of federalism as he was, could not resist the temptation offered by a surplus in the treasury in 1806, and suggested that the money be applied to "the great purposes of public education, roads, rivers, canals, and such other objects of public improvement as it may be thought proper." He doubted, however, the authority of Congress thus to dispose of the Federal funds and recommended an appropriate amendment to the Constitution. President Madison also called the attention of Congress to "the great importance of establishing throughout our country the roads and canals which can best be executed under national authority," and while he lauded the efforts of the states, pointed out that "national jurisdiction and national means" would be more effective. He recognized, as Jefferson did, a constitutional defect against carrying his program into effect, and later vetoed a bill which had passed Congress to use Federal funds for internal improvements, holding that the power to regulate commerce did not include the power to construct roads and canals, nor improve the navigation of water courses. He expressed the belief, also, "that the permanent success of the Constitution depends upon a definite partition of powers between the general and the state governments." President Monroe vetoed in 1822, upon the same grounds, "An act for the preservation and repair of the Cumberland Road," in 1830 President Jackson vetoed the Maysville turnpike bill, the first of a series of vetoes of internal improve-

ment bills; and as late as 1847 President Polk vetoed a river and harbor bill. The men in Congress who shared these views introduced amendments to the Constitution by which they sought to confer upon Congress the power which seemed to be a matter of doubt.

No concerted effort was, however, put forth toward securing the adoption of these proposed amendments and, in the meantime, the door of the Federal treasury stood invitingly open. The desire to benefit from the expenditure of Federal funds overcame all scruples. A popular pressure which could not be withstood finally led Congress to embark upon a policy which, up to the present time, has resulted in the expenditure of nearly \$1,000,000,000 for river and harbor improvements alone. It has not been unusual for appropriation bills of this character to aggregate as much as \$80,000,000 in a single year and for the enjoyment of participating in the distribution of this vast amount of Federal wealth, the states eagerly welcome the presence of Federal agents within their boundaries and hasten to demonstrate the navigability of streams which are only deep enough to float barges and logs. The construction of public buildings has been another favorite method of securing the expenditure of Federal funds within state borders, only a few brave and conscientious spirits questioning the honesty of wholesale raids upon the national treasury. Outside of Congress, the river and harbor bills, and the public building bills are characterized as "pork," and well deserve the name. The point to be emphasized, however, is that the idea of legitimatising these appropriations by the adoption of an amendment to the Constitution has been utterly forgotten, because if the people's representatives decide that these expenditures are to be made, who shall say them nay?

A well-filled Federal treasury invites a multitude of appropriations. It is the money of the people, and the representatives of the people spend it for their con-

stituents. Who are these constituents? The rural population of the United States, according to the last census, was over forty-eight million, of whom twenty-five million were males, while the urban was only forty-two million. In the fact that a very large proportion of the electorate of this country resides in rural districts is to be found the convincing reason for the extension of governmental functions in behalf of the agriculturist. The golden bait of getting something for nothing is dangled before the eyes of the farmers by vote-seeking congressmen and the farmers, in turn, quite willingly forget the duties which the state owes to its citizens as they share in the benefits of Federal activities. The Department of Agriculture, which is the executive division of the government most intimately connected with the farming class, has developed with hot-house rapidity under the nurture of federalistic sentiment. The figures tell the story. In 1894, the division of botany in the Department of Agriculture cost \$8,600 per annum, while twenty years later the appropriations for the Bureau of Plant Industry aggregated over \$2,000,000. The expenditures of the Bureau of Forestry increased during the same period from \$7,280 to considerably in excess of \$5,000,000. The Bureau of Chemistry is comparatively a new creation, but this does not prevent it from spending over \$1,000,000 a year, mainly for the enforcement of the pure food law. Meat inspection, a responsibility from which the states have been relieved, also costs \$1,000,000 annually. Consideration for the welfare of the people is undoubtedly within the sphere of government, but it is certain that the founders of this republic never contemplated the degree of intimate regard for the individual which is now apparent. The vast sums expended by Federal agents concern every detail of farm life—not only as to advising the farmer as to the care of his animals and plants, including ornamental shrubs, and an inquiry into the diseases of ginseng, but how to

bale and wrap his cotton, cure his tobacco and market his eggs. We have certainly reached a remarkable stage in our national existence when a southern democrat can announce upon the floor of the House, with apparent satisfaction, that "five hundred and thirty-five hog pastures were built in Georgia under the plan of the Federal Department of Agriculture."

Another striking instance of bureaucratic growth is the Bureau of Standards. In its inception, a little more than twenty years ago, this office consisted of an adjuster, a mechanic, a messenger and a watchman. To-day this Bureau expends nearly \$1,000,000 per annum, is housed in costly buildings surrounded by extensive grounds, and its duties range from investigating the danger to life and property due to the transmission of electric currents at high potentials, to determining the fire-resisting properties of building materials. The people, through Congress, have granted these large sums and authorized these unusual governmental duties on the theory, apparently, that the work is for the public welfare and cannot, or will not, be undertaken by the states. Certainly no other reason can be advanced, for instance, for taking out of the Federal treasury \$400,000 in a single year for the sole purpose of eradicating the cattle tick. The most notable advance in recent years, however, is in the rural free delivery mail service. Nobody questions the fact that postal matters are within the jurisdiction of the Federal government, but this one item demonstrates how great a single branch of public service can become. In the post-office appropriation bill for 1894 appears a modest appropriation of \$10,000 to be applied, under the direction of the Postmaster General, to experimental free delivery in rural communities other than towns and villages. The post-office appropriation bill for the current year carries for this experiment of two decades ago the enormous sum of nearly \$55,000,000.

So enlarged have the powers and duties of the Fed-



eral government become that the Civil Service Commission, which in 1894 consisted of three commissioners and a dozen clerks, is now a most pretentious Bureau, requiring several hundred clerks and a large executive staff to handle the examination papers of the army of government employees. The field force of the commission alone today costs more than the entire expense of the organization in 1894. The enforced growth of the Federal power also creates a constant demand for new departments. Two have been established in recent years, the latest being the Department of Labor, while a Department of Health is being earnestly advocated. These departments naturally increased the number of bureaus. In the Department of Commerce, a comparatively new institution, there are the Bureau of Corporations, the Bureau of Lighthouses, the Bureau of Foreign and Domestic Commerce, the Bureau of Fisheries, the Bureau of Navigation, the Bureau of Mines and several others. There are scores upon scores of bureaus in connection with the eleven departments of the government, and government inspectors or officials of various kinds now number thousands where, a few years ago, they could be counted by the score. In view of this, it is impossible not to recall the fact that one of the complaints against King George III in the Declaration of Independence was in these words:

He has erected a multitude of new offices, and sent thither swarms of officers, to harass our people and eat out our substance.

What is to be said today, when a multitude of new offices is being erected every year and when swarms of officers are maintained at enormous costs upon the public treasury? Of course, in the days of our forefathers, the objectionable officers were imposed upon the people by a monarch against their will. Today the offices are created by laws enacted by the representatives of the people, the latter being now apparently quite willing to be

harassed and to allow their substance to go into the pockets of Federal officials.

The end is not yet. It is practically certain, for example, that within the next ten years the Bureau of Education, now a modest attachment of the Department of the Interior, will reach colossal size. There is in Congress a growing belief that the dispensing of education in wholesale fashion is a governmental duty, without regard to the efforts put forth, or the facilities provided by, the states. It is true that the House of Representatives, after an entire day spent in debate, declined to pass a measure which directed the Commissioner of Education to investigate illiteracy among the adult population of the United States and report upon the means by which this illiteracy might be reduced or eliminated; but defeat was only made possible by the opposing influence of the all-powerful chairman of the Committee on Appropriations, Mr. Fitzgerald, of New York, who protested against "a movement which, if continued and not stopped, means an entire change in our system of government, a practical subordination of state and local governments, if not the elimination of local self-government in this country, and the building up of a great federalized central government, which I believe is the greatest menace to this country." The defeat of this particular measure will not dishearten those who, despite Mr. Fitzgerald's warning, would indefinitely extend governmental activities. There have been propositions in Congress to appropriate \$1,000,000 annually for a teachers' training fund, to be distributed proportionately among the states for the purpose of preparing teachers to give vocational instruction in agriculture, the trades and industries and home economics; to take \$17,000,000 annually out of the Federal treasury for the maintenance of instruction in the same subjects in grade schools, normal schools and colleges throughout the United States; and for the Federal government to undertake a general



education survey of the United States and its possessions, although the author of the latter measure, with a qualm of states rights' conscience, is willing to have states and localities bear half the expense when they cooperate with the Federal Commissioner of Education. Many other educational schemes have been introduced in Congress—the establishment of an elementary industrial school in the Appalachian mountains and the creation of educational parental courts, for instance—and the number is certain to be increased in the near future. It is a conservative prediction to say that some of them will be enacted into laws. If the Federal government can go into the states to afford aid to the individual farmer; if it can insure the purity of every article of food manufactured within a state border; if it can carry our parcels and take care of our surplus earnings, it can certainly undertake universal education. The argument of the greatest good to the greatest number, regardless of constitutional limitations or state jurisdiction, will prevail in the future as it has in the past. Very extravagant may seem the propositions just cited, but they are not more so than actual laws and appropriations recently enacted, and the scope of which, ten or twenty years ago, would have been regarded as beyond imagination.

There is one phase of Federal power which, although granted by the people through their representatives, is still, in the minds of many, open to serious question. This is the reservation for future use of enormous tracts of land in the western states. The law which empowered the President to set apart "public lands wholly or in part covered with undergrowth, whether of commercial value or not, as public reservations," was, at first, administered in restricted fashion; but, during Roosevelt's administration, the principle of conservation was carried by him to such a degree that Congress passed a law forbidding further forest reservations to be made in Colorado, Wyoming, Idaho, Montana, Wash-

ington or Oregon, without its consent. President Roosevelt, aware that this prohibition would pass Congress, circumvented its purpose by reserving additional areas aggregating thirty million acres during the ten days intervening after the congressional enactment had been presented to him for approval. There have now been withdrawn one hundred and ninety-two million acres under the Forest Reserve Act, and innumerable forest rangers and other Federal agents now populate the western country and compel obedience to Federal regulations. Under laws enacted by the representatives of the people the imposition upon the western states has gone much further. Various statutes, which need not be recited in detail, tax the natural resources of the public domain through leases of grazing, oil, phosphate, asphaltum, coal and mineral lands for the benefit of the Federal treasury, while power plants are made to pay a royalty to the Federal government for each horsepower generated by falling water. In Colorado no less than fifteen million acres of land have been set aside as forest reserves, while ten million acres of coal land have been withdrawn from entry or a leasing value set upon them so high as to make their utilization prohibitive. This vast territory is equal to the area covered by the entire states of Massachusetts, Connecticut, New Hampshire and Rhode Island. In Oregon over sixteen million acres and in Washington more than ten million acres are under Federal dominion, with no possibility of the states enjoying the benefit therefrom. The attitude of these states is naturally one of protest against alleged injustice. Their citizens point to the acts which enabled them to form a state government and which provided that "the state, when formed, shall be admitted into the union upon an equal footing with the original states in all respect whatever," and claim a violation of these statutes because the advantages possessed by the original states have been denied to them. Not only has the growth of popu-

lation been greatly retarded by making settlement difficult and restricting the area for home-builders to occupy, but, inasmuch as no taxes can be collected upon lands owned by the United States, the revenue, as well as the resources of the states, have been seriously impaired. It is pointed out, for instance, that the natural resources of Pennsylvania are not taxed by the Federal government, but accrue to the benefit of the state and its citizens, whereas in the western states the Federal government levies and collects the tax. It is no wonder that in states where the Federal government exercises so much control there is a feeling of resentment, or that the assertion that these conditions represent a degree of interference in local affairs never before attempted in this country finds a responsive echo within their borders.

#### BROADENING THE FEDERAL FIELD

When experiments had become experiences, the area of Federal control broadened with tremendous rapidity. A flood of Federal legislation descended upon the country, sweeping everything before it. With breadth and impetus the flood has now swept over the intervening state barriers and is still moving onward with irresistible force.

These enactments have come as the logical outcome of events. The public mind has become completely saturated with a feeling of absolute faith in the efficacy of Federal power. Propositions that a few years ago would have been ridiculed are now accepted with composure and even cordiality, the mastery attained over railroad and other corporations having whetted the public appetite for further conquests. Naturally there was no hesitation when, in response to an imperative demand, the suggestion was made that the Federal power might be successfully employed in suppressing the traffic in

women for immoral purposes. The so-called White Slave Act is an attempt on the part of the Federal government to lessen immorality by burdening vice with conditions and punishments which make its practice difficult. The statute was an evolution. As long ago as 1875 a Federal act made it illegal to import women for immoral purposes; but not being wholly effective, another law was passed in 1907. As this contained an unconstitutional provision, it was later amended. It did not remedy the evil. There was still a traffic in women which neither Federal nor state law had been able to reach. Once again, therefore, the Federal power was called into requisition and by an ingenious scheme the reform was accomplished under the comprehensive authority given to Congress to regulate commerce among the several states. The act, as finally approved, forbids the transporting, or obtaining transportation for, in interstate or foreign commerce, any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose; and the Supreme Court has already decided that the transportation need not be in or by an interstate carrier. Persuading, inducing, enticing or coercing any woman or girl to go from one state to another for an immoral purpose is prohibited under heavy penalties. The law, however, goes still further. The mere intent or purpose, verbally expressed, on the part of any person to have a woman or girl engage in immorality is classed as a felony. This section of the law was severely criticised as bringing a purely mental operation under the domain of interstate commerce; and it was also questioned whether conversation could be regarded as being within the meaning of the word "commerce" in the Constitution. On the other hand, it was argued that if the transportation of lottery tickets could be prohibited, not because pieces of paper were in themselves harmful, but because of the injurious connection between them and the entire scheme of the lottery, the

interstate transportation of women for the purposes of immorality could also be made illegal. It was shown, too, that the Supreme Court had held that solicitation of business for a firm outside of its own state was a part of interstate commerce. It was not the arguments as to the constitutionality of the proposed law, however, which determined its enactment. It was the fact that the so-called White Slave traffic "shocked the moral sense of the nation," and the people, through their representatives, were bent upon its abolition, even if the power of the Federal government had to be invoked in devious ways. The fact that the United States Supreme Court has upheld the law in at least four decisions will further stimulate the exercise of the Federal power in overcoming the next evil which arouses nation-wide condemnation.

Not only do men and women crossing state borders pass under the control of the Federal government, but even the birds that fly through the air have been placed in the same category. In a law approved March 3, 1913, making appropriations for the Department of Agriculture, is a clause which declares that all migratory and insectivorous birds which do not remain permanently throughout the entire year in any state or territory, "shall hereafter be deemed within the custody and protection of the government of the United States, and shall not be destroyed or taken contrary to regulations hereinafter provided for." These regulations have been promulgated by the Department of Agriculture, and fine or imprisonment is the punishment of any person convicted of their violation. A provision in the law, not devoid of sarcastic humor, asserts "that nothing herein contained shall be deemed . . . to prevent the states and territories from enacting laws and regulations to promote and render efficient the regulations of the Department of Agriculture provided under this act." In other words, the moment the President of the United States

made this statute effective by affixing his signature of approval, that moment all the game laws of all the states were wiped out of existence. In their stead was erected a series of regulations framed by a Federal official at Washington. So completely has the Federal authority supplanted the authority of the states in this particular that recently, when citizens and landowners in South Carolina desired to shoot ducks in that state during a certain month, they were compelled to confer with the chief of the Biological Survey in Washington, an appointed official paid a salary of \$3,500 a year, in order to obtain the necessary permission, even though the season in which they desired to indulge in the sport was legal according to their state laws. Two reasons seem to have actuated the representatives of the people in Congress in this complete surrender of state sovereignty—first, that unless birds are safeguarded the injury done by insects will increase and that this protection could not be accorded except by the Federal government owing to “the multiplicity of state laws and the divergence of their provisions.” The profundity of the argument brought to bear upon the Senate is shown in the favorable report made to that body upon the bill. “But for the vegetation the insects would perish,” it says, “and but for the insects the birds would perish, and but for the birds the vegetation would be utterly destroyed.” Thus was rhythm and logic happily combined; while it was also soberly quoted in the debate, as another reason for a Federal law, that although Texas makes the killing of a robin an offence punishable by a fine of \$5, the law is not enforced by the state, wherefore the heavy hand of Federal authority must be laid not only upon Texas but upon every other state in the union. As against such arguments as these, the serious presentation of state jurisdiction under the Constitution was naturally unavailing. In vain was it urged that the black-bird or the crow that wings its flight across the blue



vault of heaven has neither consignor nor consignee, and is not, therefore, interstate commerce; or that the Federal government has no police power in the states for the protection of its property not on Federal ground; or that it was preposterous to suppose that a barefoot boy could be arrested, taken before a Federal judge, and fined or imprisoned for an act which was not in violation of any local statute. Judicial determination of the constitutionality of this act is now pending in the United States Supreme Court in the case of the United States, plaintiff in error, vs. Harvey C. Shauver; but, in the meantime, the House of Representatives has reaffirmed the law and has made it operative by granting to the Federal government a generous appropriation for its enforcement. It is not surprising that an effort is now being made to place migratory fishes under Federal control, so that even the Mississippi catfish may ere long swim proudly under government protection. This seems absurd; and yet it must not be forgotten that if Federal protection is extended over the fishes, it will be done by the formal enactment of a law by the representatives of the people. It may have been, in the matter of the bird legislation, that the Federal official whose duties are chiefly ornithological was unduly active in creating sentiment favorable to the law; but the fact remains that his efforts would have been in vain if they had not been sanctioned by the branch of the government which represents the people.

Another striking and most unusual instance of the exercise of Federal power was presented in the congressional investigations of purely local strike conditions in West Virginia, Michigan and Colorado. It will be remembered that President Cleveland directed United States troops to be employed in an effort, during the strike of railroad employees in Chicago, to insure the safe and uninterrupted transit of the United States mail, the local authorities being apparently unable to cope with

the situation. There was justification for Mr. Cleveland's action. The conditions in Paint Creek, West Virginia, in the spring of 1913 were by no means analogous. There was trouble between the coal miners and the mine owners, but no Federal function suffered violation or interference. However, in order to find an excuse for conducting a Federal inquiry into a state condition, the Senate Committee on Education and Labor was solemnly directed to proceed to Paint Creek and discover "whether or not postal services have been or are being interfered with or obstructed in said coal fields"; and "whether or not the immigration laws of this country have been or are being violated, and whether there were any agreements or combinations entered into contrary to the laws of the United States; and, finally, if any or all of these conditions exist, to investigate and report upon the causes leading to such conditions." Altogether unavailing was the assertion of the senators from West Virginia that the state authorities were competently handling the situation. Equally futile was the charge that the resolution of authorization offered only a thinly clad excuse for an unwarranted Federal interference. The resolution was adopted and the Federal committee started upon its mission of inquiry. Its report was not submitted for a year. In the meantime, the strike had been settled; but the upholders of the doctrine of Federal control cited the presence of the Federal committee in the strike region as a powerful factor in restoring peace and order. The basis of the inquiry into the strike situations in the copper district of Michigan and the coal fields of Colorado was identical with that set forth in the Paint Creek resolution; and the House of Representatives having ordered the investigations, the congressional committees visited the respective localities, not hesitating to summon local and state officials and question them as to the reason for the existing conditions. As a result of the inquiry, the request has been made that



strikebreakers be barred from going from one state to another, which is a new application of the authority to regulate commerce. There may be some question as to the propriety of Federal invasion of state territory when there is not even *prima facie* evidence that any detail of Federal administration is involved; but there is no disputing the fact that the invaders went armed with a mandate from all the people, issued through their representatives. It must be admitted, therefore, that the Federal investigators neither violated nor usurped power. They acted in accordance with law, enacted by those to whom the authority to make laws had been duly delegated by the people.

The fight over the so-called child labor law was lengthy and bitterly contested. The opposition to its enactment came mainly from the southern states, for two reasons—first, because it is in the south that the doctrine of states rights is finding its last citadel, and, second, because in that section child labor is very largely used. The doctrine of paramount necessity, however, again prevailed and the measure became a law. In this case, as in many others, the desired result was attempted through indirection. It was manifestly futile to propose a law to supplant directly the legislation of a state, but it seemed possible to forbid the interstate shipment of any product of a mine or quarry upon which a child under sixteen years of age had labored or the product of any mill, cannery, workshop, factory or manufacturing establishment whereon children under the age of fourteen years, or children between the ages of fourteen and sixteen years, had labored, except that in the latter case employment during eight hours between 6 a.m. and 7 p.m. was permitted. This prohibition sought to accomplish a change imperatively demanded by existing conditions: and although the Supreme Court of the United States, by the narrow majority of five to four, has declared the law unconstitutional, there is no doubt

that Congress will amend the act so as to overcome this adverse decision. The reasons which have compelled the enactment of beneficent and humane Federal laws obtain with especial force in the matter of child labor and eventually the proposed and necessary reform will be accomplished.

Another wide application of Federal power is embodied in the Federal Farm Loan Act, which was approved July 17, 1916. This law was inspired by the fact that while bank loans could be obtained upon stocks and bonds of approved security, the farmer was financially handicapped because he owned nothing but his land. It is not necessary here to review the four years of agitation which preceded the enactment of the law nor to rehearse the obvious arguments which were advanced by those who favored the legislation. Suffice it to say that, it being apparently taken for granted that the states have neither the desire nor the ability to provide for the financial needs of the farmers within their borders, there is now a Federal Farm Loan Board, consisting of five members, including the Secretary of the Treasury, who is chairman *ex officio*. This Board has divided the United States into twelve districts and has established Federal land banks, each with a subscribed capital of not less than \$750,000. National farm loan associations, have also been organized under the provisions of the act, and, in fact, thousands of needy farmers have already been accommodated with funds. In view of the certainty that the operations of these Federal banks will extend into every community it is quite evident that the country will now witness in widespread fashion another demonstration of the beneficence of Federal power when exercised for the general good. It is really not a far cry from these Federal farm loan banks to the governmental pawnshops maintained for the poor by France and Mexico. If for the stockholder and bondholder the government can provide a method of borrowing; and if the

same advantage can be accorded the owner of land, there is no reason why equal consideration should not be given to the citizen who can only pledge his personal effects. The whole transaction is merely one of degree.

The bold stroke by which Congress established eight hours as a day's work on every railroad in the United States, except those less than one hundred miles in length or street or interurban roads operated by electricity, is another extension of Federal power not to be lightly considered. The importance of the enactment is not alone in the fact that Congress can, almost overnight, effect an industrial revolution, but in its demonstration that we too often do our national thinking in terms of politics—a lesson which is serious enough if we are to continue moving forward along present lines. The demand of the two million employees, known in railroad circles as the Four Brotherhoods, for the legal establishment of an eight-hour day was coupled with the threat of a nation-wide strike and that, too, with a presidential election only sixty days distant. It was manifestly fatal for the administration in power, from a political point of view, for either the strike to occur or for the Brotherhoods to fail in their desire. Consequently the law was hastily framed and passed with equal precipitancy, being approved by the President on September 3, 1916. The oft-repeated experiment of utilizing interstate commerce as the agency to make the law effective was resorted to, as it can be at any time in the future when the organized employees of the railroads decide to formulate additional demands, especially as the Supreme Court of the United States has decided that in the constitutional right to "regulate commerce" is embraced the authority to specify hours of labor. Nor is it necessary to confine the outlook to railroad employees alone. Any class of men, sufficiently numerous and organized, can secure the same result. With a demagog in the White House truckling for votes in order

to secure his re-election, and with a Congress of cowardly politicians equally desirous of catering to those upon whom their position depends, we might easily be confronted with a menacing situation. The path which has been opened by the passage of the eight-hour law is a wide one and no one can tell whither it will lead. Not so long ago some of the states enacted what are known as "full-crew" railroad laws, but in other states similar measures were defeated. There is nothing to prevent a Federal law being enacted which will fasten the desired legislation upon all the states. All social and industrial reforms may be accomplished in the same manner. Woman suffrage, with women wielding the ballot in more than twenty states, must be seriously regarded. When the women voters desire to invoke Federal power in behalf of altruistic principles and back their appeal with promise of support or threat of antagonism at the polls, the laws which they propose may be enacted, and the units which we now designate by the name of states may find themselves more atrophied than ever.

Perhaps, after all, the climax of federalism is to be found in the so-called Federal Reserve Act. Under this law, which has reformed the currency system of the country, a Federal Reserve Board has been appointed. It consists of seven members, of whom two are the Secretary of the Treasury and the Comptroller of the Currency. The other five are named by the President and confirmed by the Senate. As all the national banks are required by the law to enter the Federal Reserve system or forfeit their charters, with the privilege of similar affiliation accorded to state banks and trust companies, the entire monetary system of the country is thus placed in the control of seven men, all of whom are, in turn, appointees, and to that extent creatures, of the President. The total capitalization of the seventy-five hundred and seventy-nine national banks thus brought together is over \$1,000,000,000. Their deposits reach the

tremendous aggregate of \$22,882,000,000 additional and this amount will be enormously increased by the receipts of the government which are now deposited in the reserve banks instead of the Federal Treasury. Here, then, are seven men, located in the national capital, agents of the Federal government, in full control of many billions of dollars. While the wisdom of legalizing this enormous power seems now unquestioned, it is appropriate to recall the memorable fight made by Andrew Jackson against the Bank of the United States. There is a difference, of course, between that institution and the Federal Reserve banks controlled by the Federal Reserve Board, because the former was a private concern, even though chartered by Congress, while the latter are directly under government control. At the same time, the words of Andrew Jackson are not altogether without bearing upon the present situation. His struggle against the bank was based upon his antagonism to the control of a vast amount of wealth by a certain few; yet the Bank of the United States dealt with millions where the Federal Reserve Board has to do with billions. The Bank of the United States, as Jackson pointed out, "possessed the power to make money plentiful or scarce at its pleasure at any time or at any place by controlling the issues of other banks and permitting an expansion or compelling a general contraction of the circulating medium according to its will." This criticism applies with equal force to the Federal Reserve Board. It was also Jackson's opinion that "to give the President the control over the currency and the power over individuals now possessed by the Bank of the United States, even with the material difference that he is responsible to the people, would be as objectionable and dangerous as to leave it where it is." It is not a far cry from this declaration of Jackson to the system now enacted into law; and a feeling of anxiety naturally arises at the thought that some day there may be in the White House

a President who would convert the Federal Reserve Board into an instrument for the accomplishment of his revenge or the furtherance of his ambition. Upon these seven men there rests a great responsibility. They can use the Federal power, as no other men can, to press the sensitive money nerve of the nation; and yet it must be emphasized that this power was granted by the representatives of the people. It is true that the legislation which authorized it was recommended and urged with much insistence by the President, but it was not incumbent upon Congress to heed unwillingly the Presidential demand. Whether the control of billions of dollars by Federal agents is to be for good or ill, the representatives of the people are responsible and the people themselves must accept the consequences.

As an evidence that we have not reached the limit of the application of Federal power, innumerable measures are introduced in each succeeding session of Congress pointing the way to further extensions. For instance, Maryland, West Virginia, Rhode Island, New Jersey and New York having adopted state laws to eliminate idleness, and these laws having been executed with some degree of success, it is now proposed, through Federal legislation to apply the same idea to the entire nation. There are also propositions to punish the false advertisement of any security or commodity which enters into interstate commerce; to establish uniform prices for uniform commodities; to attach a Federal label to all fabrics and leather goods; to provide for the Federal inspection and grading of grain; and to fix the size of fruit baskets. The National Wage Commission bill has many advocates. It provides that the President shall appoint a wage commissioner for each congressional district in the United States to investigate every complaint of alleged insufficient, inequitable or unjust wage. This, of course, would be Federal interference, supervision and control to the last degree. Senator Chil-



ton, of Texas, has seriously proposed that the Federal government shall establish a minimum wage of \$9 per week for all females employed by persons, firms or corporations doing an interstate commerce business. Another proposition defines and regulates investment companies authorized to use the mail and makes the very act of using the mails a sufficient foundation for bringing any person, firm or corporation within the sphere of Federal control.

These instances could be indefinitely multiplied. They illustrate the tendency of the times. There is absolutely no limit to the phases which invite the application of Federal authority, apart from any question of war emergency. Congress has already gone far; but judging the future from the past, it has only touched the edges of the great domain wherein Federal power may be exerted. No one can examine the record of the laws already passed, nor scan the list of measures awaiting action, without realizing that popular approval is bestowed upon every effort to invoke Federal aid in the securing of beneficent results.

## HOW TO PRESERVE THE LOCAL SELF- GOVERNMENT OF THE STATES <sup>1</sup>

What is to be the future of the states of the union under our dual system of constitutional government?

The conditions under which the clauses of the Constitution distributing powers to the national and state governments are now and henceforth to be applied, are widely different from the conditions which were or could have been within the contemplation of the framers of the Constitution, and widely different from those which obtained during the early years of the republic. When the authors of *The Federalist* argued and expounded

<sup>1</sup> Speech of Elihu Root at the dinner of the Pennsylvania Society in New York, December 12, 1906.

the reasons for union and the utility of the provisions contained in the Constitution, each separate colony transformed into a state was complete in itself and sufficient to itself, except as to a few exceedingly simple external relations of state to state and to foreign nations; from the origin of production to the final consumption of the product, from the birth of a citizen to his death, the business, the social and the political life of each separate community began and ended for the most part within the limits of the state itself; the long time required for travel and communication between the different centers of population, the difficulties and hardships of long and laborious journeys, the slowness of the mails, and the enormous cost of transporting goods, kept the people of each state tributary to their own separate colonial center of trade and influence, and kept their activities within the ample and sufficient jurisdiction of the local laws of their state. The fear of the fathers of the republic was that these separate and self-sufficient communities would fall apart, that the union would resolve into its constituent elements, or that, as it grew in population and area, it would split up into a number of separate confederacies. Few of the men of 1787 would have deemed it possible that the union they were forming could be maintained among eighty-five millions of people, spread over the vast expanse from the Atlantic to the Pacific and from the Lakes to the Gulf.

Three principal causes have made this possible.

One cause has been the growth of a national sentiment, which was at first almost imperceptible. The very difficulties and hardships to which our nation was subjected in its early years, the injuries to our commerce, and the insults and indignities to our flag on the part of both of the contestants in the great Napoleonic wars, served to keep the nation and national interests and national dignity constantly before the minds and in the feelings of the people. As the tide of emigration swept



westward, new states were formed of citizens who looked back to the older states as the homes of their childhood and their affection and the origin of their laws and customs, and who never had the peculiar and special, separate political life of the colonies. The Civil War settled the supremacy of the nation throughout the territory of the union, and its sacrifices sanctified and made enduring that national sentiment. Our country as a whole, the noble and beloved land of every citizen of every state, has become the object of pride and devotion among all our people, north and south, within the limits of the proud old colonial commonwealths, throughout the vast region where Burr once dreamed of a separate empire dominating the valley of the Mississippi, and upon the far-distant shores of the Pacific; and by the side of this strong and glowing loyalty to the nation, sentiment for the separate states has become dim and faint in comparison.

The second great influence has been the knitting together in ties of common interest, of the people forming the once separate communities through the working of free trade among the states. Never was a concession dictated by enlightened judgment for the common benefit, more richly repaid than that by which the states surrendered in the Federal Constitution the right to lay imposts or duties on imports or exports without the consent of Congress. To it we owe the domestic market for the products of our farms and forests and mines and factories without a parallel in history, and an internal trade which already exceeds the entire foreign trade of all the rest of the world; and to it we owe in a high degree the constant drawing together of all parts of our vast and diversified country in the bands of common interest and in the improving good understanding and kindly feeling of frequent intercourse.

The third great cause of change is the marvelous development of facilities for travel and communication

produced by the inventions and discoveries of the past century. The swift trains that pass over our two hundred and twenty thousand miles of railroad, the seventy millions of messages that flash over the more than fourteen hundred thousand miles of telegraph wires, the conversations across vast spaces through our more than four million four hundred thousand telephone instruments, take no note of state lines; they have broken down the barriers between the separate communities and they have led to a reorganization of the business and social life of the people of the United States along lines which, for the most part, altogether ignore the boundaries of the states. I left the borders of Virginia this afternoon and traversed Maryland, Delaware, Pennsylvania, and New Jersey to the state of New York, and, barring accident, I shall breakfast tomorrow morning again on the shore of the Potomac. The time required for this journey would hardly have sufficed for an ordinary carriage drive from the adjoining county of Westchester a hundred years ago. Any one of us can go now into a neighboring room in this hotel and talk with a friend in Boston or Chicago and recognize his voice and transact business which formerly would have required months to accomplish, if it could have been done at all. The lines of trade, of financial operation, of social intercourse, of thought and opinion that radiate from the great centers of life in our country such as Boston and New York, and Philadelphia and Baltimore, and Chicago and St. Louis, and New Orleans and San Francisco, and many another great city, are perfectly regardless of state distinctions. Our whole life has swung away from the old state centers and is crystallizing about national centers; the farmer harvests his grain and fattens his cattle, not as formerly, with reference to the wants of his own home community, but for markets thousands of miles away; the manufacturer operates his mills and his factories to meet the needs of far-distant consumers; the merchant has his

customers in many states;<sup>1</sup> all—the farmer, the manufacturer, the merchant, the laborer—look for the supplies of their food and clothing, not to the resources of the home farm, or village, or town, but to the resources of the whole continent. The people move in great throngs to and fro from state to state and across states; the important news of each community is read at every breakfast table throughout the country; the interchange of thought and sentiment and information is universal; in the wide range of daily life and activity and interest the old lines between the states and the old barriers which kept the states as separate communities are completely lost from sight. The growth of national habits in the daily life of a homogeneous people keeps pace with the growth of national sentiment.

Such changes in the life of the people cannot fail to produce corresponding political changes. Some of those changes can be plainly seen now in progress. It is plainly to be seen that the people of the country are coming to the conclusion that in certain important respects the local laws of the separate states, which were adequate for the due and just regulation and control of the business which was transacted, and the activity which began and ended within the limits of the several states, are inadequate for the due and just control of the business and activities which extend throughout all the states, and that such power of regulation and control is gradually passing into the hands of the national government. Sometimes by an assertion of the interstate commerce power, sometimes by an assertion of the taxing power, the national government is taking up the performance of duties which under the changed conditions the separate states are no longer capable of adequately performing. The Federal anti-trust law, the anti-rebate law, the railroad rate law, the meat-inspection law, the oleomargarine law, the pure-food law, are examples of the purpose of the people of the United States to do through

the agency of the national government the things which the separate state governments formerly did adequately but no longer do adequately. The end is not yet. The process that interweaves the life and action of the people in every section of our country with the people in every other section, continues and will continue with increasing force and effect; we are urging forward in a development of business and social life which tends more and more to the obliteration of state lines and the decrease of state power as compared with national power; the relations of the business over which the Federal government is assuming control, of interstate transportation with state transportation, of interstate commerce with state commerce, are so intimate and the separation of the two is so impracticable, that the tendency is plainly toward the practical control of the national government over both. New projects of national control are mooted; control of insurance, uniform divorce laws, child labor laws, and many others affecting matters formerly entirely within the cognizance of the state are proposed.

With these changes and tendencies, in what way can the power of the states be preserved?

I submit to your judgment, and I desire to press upon you with all the earnestness I possess, that there is but one way in which the states of the union can maintain their power and authority under the conditions which are now before us, and that way is by an awakening on the part of the states to a realization of their own duties to the country at large. [Under the conditions which now exist, no state can live unto itself alone, and regulate its affairs with sole reference to its own treasury, its own convenience, its own special interests.] Every state is bound to frame its legislation and its administration with reference not only to its own special affairs, but with reference to the effect upon all its sister states, as every individual is bound to regulate his conduct with

some reference to its effect upon his neighbors. The more populous the community and the closer individuals are brought together, the more imperative becomes the necessity which constrains and limits individual conduct. If any state is maintaining laws which afford opportunity and authority for practices condemned by the public sense of the whole country, or laws which, through the operation of our modern system of communications and business, are injurious to the interests of the whole country, that state is violating the conditions upon which alone its power can be preserved. If any state maintains laws which promote and foster the enormous overcapitalization of corporations condemned by the people of the country generally; if any state maintains laws designed to make easy the formation of trusts and the creation of monopolies; if any state maintains laws which permit conditions of child labor revolting to the sense of mankind; if any state maintains laws of marriage and divorce so far inconsistent with the general standard of the nation as violently to derange the domestic relations, which the majority of the states desire to preserve, that state is promoting the tendency of the people of the country to seek relief through the national government and to press forward the movement for national control and the extinction of local control. The intervention of the national government in many of the matters which it has recently undertaken would have been wholly unnecessary if the states themselves had been alive to their duty toward the general body of the country.

It is useless for the advocates of states rights to inveigh against the supremacy of the constitutional laws of the United States or against the extension of national authority in the fields of necessary control where the states themselves fail in the performance of their duty. The instinct for self-government among the people of the United States is too strong to permit them long to respect any one's right to exercise a power which he

fails to exercise. The governmental control which they deem just and necessary they will have. It may be that such control would better be exercised in particular instances by the governments of the states, but the people will have the control they need, either from the states or from the national government; and if the states fail to furnish it in due measure, sooner or later constructions of the Constitution will be found to vest the power where it will be exercised—in the national government. The true and only way to preserve state authority is to be found in the awakened conscience of the states, their broadened views and higher standard of responsibility to the general public; in effective legislation by the states, in conformity to the general moral sense of the country; and in the vigorous exercise for the general public good of that state authority which is to be preserved.

### RESPONSIBILITIES OF THE STATES <sup>1</sup>

When dealing with the distribution of powers between the general government and the states, Chief Justice Marshall declared:

When the American people created a national legislature with certain powers, it was neither necessary nor proper to define the powers reserved by the States. Those powers proceed, not from the people of America, but from the people of the several States, and remained after the adoption of the Constitution what they were before, except so far as they may be abridged by that instrument.

Our constitutional history started with the states retaining all powers of sovereignty unimpaired, save those conferred upon the national government. The evolution of the constitutional system has consisted largely in determining the line of demarcation between state and national authority. The cases involved are many and complicated, but there is a fairly good popular understanding

<sup>1</sup> From President Coolidge's Memorial Day Address at Arlington National Cemetery, May 30, 1925.



of this continuing struggle between these contending sovereignties. Because of better communication and transportation, the constant tendency has been to more and more social and economic unification. The present continent-wide union of forty-eight states is much closer than was the original group of thirteen states.

This increasing unification has well-nigh obliterated state lines so far as concerns many relations of life. Yet in a country of such enormous expanse, there must always be certain regional differences in social outlook and economic thought. The most familiar illustration of this is found in the history of slavery. The Constitution did not interfere with slavery, except to fix a time when the foreign slave trade should be abolished. Yet within a generation the country was confronting a sharp sectional division on this issue. Changing economic conditions made slavery profitable in the south, but left it unprofitable in the north. The resulting war might have been avoided if the south had adopted a policy of ultimate abolition. But as this method was not pursued the differences grew sharper until they brought on the great conflict.

Though the war ended forever the possibility of disunion, there still remain problems between state and Federal authority. There are divisions of interest, perhaps more apparent than real, among geographical sections or social groups. The seaboard thinks it has interests in maritime transportation and overseas commerce which differ greatly from those of the interior, which is peculiarly dependent upon railroads. Difference in climate and physical conditions throughout so great a territory tend to varied social habits and modes of living which react upon the economic and political attitudes. The industrial development of some sections contrasts with the agricultural character of others. Obviously, these differences give rise to many problems in government, which must always be recognized. But it is hardly con-



ceivable that a really manacng contest between the sovereignty of the states and of the union could ever again arise.

Our country, having devised this dual system of government and lived under it longer than any other, is deeply concerned to perfect and adapt it to the changing conditions of organized society. A community comprising half a continent and more than a hundred million people, could not possibly be administered under a single government organization. We must maintain a proper measure of local self-government while constantly making adjustments to an increasing interdependence among the political parts.

Our national history has presented various phases of this problem. Slavery showed one; the complexities of interstate commerce have kept others constantly in mind. On the day the Constitution was finished, probably more people would have seen seeds of conflict and dangers to the union in future commercial relations than in slavery. But commerce became a source of strength, while slavery became a cause of division. It brought the union into danger; and in the end was destroyed itself. Where there was sincere acceptance of the dual sovereignty theory; where the states sought to do their full part, and accepted the determinations of the national government as to the rest, the plan worked. Where the states sought more from the Federal authority than it could give, and resisted national demands—then came dissension and, at length, war.

It would be folly to deny that we still have problems of interstate relations to handle. We boast that this is a land of equal opportunity for all. We insist that there is one law for all the people. But that equality suffers often because of the divergencies between the laws of different states. So long as some can go to a distant state for divorces which others are denied at home, there is not equality in this regard. When some states grant

valuable exemptions from taxation which other states impose, one person may enjoy while another is denied these benefits.

A few years ago a majority of the states had adopted prohibition or rigid restrictions on the traffic in intoxicating liquor. But other states did not cooperate in advancing this policy, and ultimately by national action it was extended to all the union. By failing to meet the requirements of a national demand the states became deprived of the power to act. If questions which the states will not fairly settle on their own account shall have to be settled from them by the Federal authority, it will only be because some states will have refused to discharge obvious duties.

There is another responsibility of the states. It is quite aside from this one of jurisdiction. It is the subject of law enforcement. We are not a lawless people, but we are too frequently a careless one. The multiplicity of laws, the varied possibilities of appeals, the disposition to technicality in procedure, the delays and consequent expense of litigation which inevitably inure to the advantage of wealth and specialized ability—all these have many times been recounted as reproaches to us. It is strange that such laxities should persist in a time like the present, which is marked by a determined upward movement in behalf of the social welfare. But they do exist. They demonstrate a need for better, prompter, less irksome, and expensive administration of the laws. They point the necessity for simplification and codification of laws; for uniformity of procedure; for more accurate delimitation of state and Federal authority.

All these problems constantly come in the work of political and social development. But they stand for a vast progression toward better conditions, a better society, a better economic system. In approaching them, we need to have in mind the federalist's analysis of our constitutional system:

The powers delegated to the Federal Government are few and defined; those to remain in the hands of the State government are numerous and indefinite.

That statement cannot be too much emphasized. The country's growth has compelled the Federal establishment to exceed by far the government plans of even the greatest states. With this growth in physical extent, in revenue, in personnel, there has inevitably been the suggestion that the Federal government was overshadowing the states. Yet the state governments deal with far more various and more intimate concerns of the people than does the national government. All the operations of the minor civil divisions, parishes, wards, school districts, towns, cities, counties, and the like, are dependencies of the state. The maintenance of order through police, the general business of enforcing law, is left to the states. So is education. Property is held and transferred on terms fixed by the states. In short, the structure of social and business relationship is built chiefly about the laws of the states. It depends upon the exercise by the states of that vastly greater share of government power which resides in them, to the exclusion of the Federal government. In ordinary times nearly the entire burden of taxation represents state and local demands. Even now, despite the enormous increase of Federal taxes from pre-war years, state and local taxes far exceed the Federal requirements. Moreover, the national burden is being continually reduced, while that of the local units is growing and likely to continue to grow.

Such is the real distribution of duties, responsibilities, and expenses. Yet people are given to thinking and speaking of the national government as "the government." They demand more from it than it was ever intended to provide; and yet in the same breath they complain that Federal authority is stretching itself over areas which do not concern it. On one side, there are demands for more amendments to the Constitution. On

the other, there is too much opposition to those that already exist.

Without doubt, the reason for increasing demands on the Federal government is that the states have not discharged their full duties. Some have done better and some worse, but as a whole they have not done all they should. So demand has grown up for a greater concentration of powers in the Federal government. If we will fairly consider it, we must conclude that the remedy would be worse than the disease. What we need is not more Federal government, but better local government. Yet many people who would agree to this have large responsibility for the lapses of local authority.

From every position of consistency with our system, more centralization ought to be avoided. The states would protest, promptly enough, anything savoring of Federal usurpation. Their protection will lie in discharging the full obligations that have been imposed on them. Once the evasion of local responsibilities becomes a habit, there is no knowing how far the consequences may reach. Every step in such a progression will be unfortunate alike for states and nation. The country needs, in grappling with the manifold problems of these times, all the courage, intelligence, training, and skill that can be enlisted in both state and national administrations.

One insidious practice which sugar-coats the dose of Federal intrusion is the division of expense for public improvements or services between state and national treasuries. The ardent states rights advocate sees in this practice a vicious weakening of the state system. The extreme federalist is apt to look upon it in cynical fashion as bribing the states into subordination. The average American, believing in our dual-sovereignty system, must feel that the policy of national doles to the states is bad and may become disastrous. We may go on yet for a time with the easy assumption that "if the states *will not*, the nation *must*." But that way lies trouble. When

the national treasury contributes half, there is temptation to extravagance by the state. We have seen some examples in connection with the Federal contributions to road building. Yet there are constant demands for more Federal contributions. Whenever by that plan we take something from one group of states and give it to another group, there is grave danger that we do an economic injustice on one side and a political injury on the other. We impose unfairly on the strength of the strong, and we encourage the weak to indulge their weakness.

When the local government unit evades its responsibility in one direction, it is started in the vicious way of disregard of law and laxity of living. The police force which is administered on the assumption that the violation of some laws may be ignored has started toward demoralization. The community which approves such administration is making dangerous concessions. There is no use disguising the fact that as a nation our attitude toward the prevention and punishment of crime needs more serious attention. I read the other day a survey which showed that in proportion to population we have eight times as many murders as Great Britain, and five times as many as France. Murder rarely goes unpunished in Britain or France; here the reverse is true. The same survey reports many times as many burglaries in parts of America as in all England; and, whereas a very high per cent of burglars in England are caught and punished, in parts of our country only a very low per cent are finally punished. The comparison cannot fail to be disturbing. The conclusion is inescapable that laxity of administration reacts upon public opinion, causing cynicism and loss of confidence in both law and its enforcement and therefore in its observance. The failure of local government has a demoralizing effect in every direction.

These are vital issues, in which the nation greatly needs a revival of interest and concern. It is senseless

to boast of our liberty when we find that to so shocking an extent it is merely the liberty to go ill-governed. It is time to take warning that neither the liberties we prize nor the system under which we claim them are safe while such conditions exist.

We shall not correct admitted and grave defects if we hesitate to recognize them. We must be frank with ourselves. We ought to be our own harshest critics. We can afford to be, for in spite of everything we still have a balance of prosperity, of general welfare, of secure freedom, and of righteous purpose, that gives us assurance of leadership among the nations.

What America needs is to hold to its ancient and well-charted course.

Our country was conceived in the theory of local self-government. It has been dedicated by long practice to that wise and beneficent policy. It is the foundation principle of our system of liberty. It makes the largest promise to the freedom and development of the individual. Its preservation is worth all the effort and all the sacrifice that it may cost.

It cannot be denied that the present tendency is not in harmony with this spirit. The individual, instead of working out his own salvation and securing his own freedom by establishing his own economic and moral independence by his own industry and his own self-mastery, tends to throw himself on some vague influence which he denominates society and to hold that in some way responsible for the sufficiency of his support and the morality of his actions. The local political units likewise look to the states, the states look to the nation, and nations are beginning to look to some vague organization, some nebulous concourse of humanity, to pay their bills and tell them what to do. This is not local self-government. It is not American. It is not the method which has made this country what it is. We cannot maintain the western standard of civilization on that theory. If it is supported



at all, it will have to be supported on the principle of individual responsibility. If that principle be maintained, the result which I believe America wishes to see produced inevitably will follow.

There is no other foundation on which freedom has ever found a permanent abiding place. We shall have to make our decision whether we wish to maintain our present institutions, or whether we wish to exchange them for something else. If we permit some one to come to support us, we cannot prevent some one coming to govern us. If we are too weak to take charge of our own morality, we shall not be strong enough to take charge of our own liberty. If we cannot govern ourselves, if we cannot observe the law, nothing remains but to have some one else govern us, to have the law enforced against us, and to step down from the honorable abiding place of freedom to the ignominious abode of servitude.

If these principles are sound, two conclusions follow. The individual and the local, state, and national political units ought to be permitted to assume their own responsibilities. Any other course in the end will be subversive both of character and liberty. But it is equally clear that they in their turn must meet their obligations. If there is to be a continuation of individual and local self-government and of state sovereignty, the individual and locality must govern themselves and the state must assert its sovereignty. Otherwise these rights and privileges will be confiscated under all compelling pressure of public necessity for a better maintenance of order and morality. The whole world has reached a stage in which, if we do not set ourselves right, we may be perfectly sure that an authority will be asserted by others for the purpose of setting us right.

But before we attempt to set ourselves up as exponents of universal reform, it would be wise to remember that progress is of slow growth, and also to remember



that moderation, patience, forbearance, and charity are virtues in their own right. The only action which can be effective in the long run is that which helps others to help themselves. Before we assume too great responsibilities in the governing of others, it would be the part of wisdom very completely to discharge our responsibilities for governing ourselves. A large amount of work has to be done at home before we can start in on the neighbors, and very considerable duties have to be performed in America before we undertake the direction of the rest of the world. But we must at all times do the best we can for ourselves without forgetting others, and the best we can for our own country without forgetting other nations.

Ours is a new land. It has had an almost unbelievable task to perform, and has performed it well. We have been called to fit the institutions of ancient civilization to the conditions of a new country. In that task the leaders of the nation have been supported by a deep devotion to the essentials of freedom. At the bottom of the national character has been a strain of religious earnestness and moral determination which has never failed to give color and quality to our institutions. Because our history shows us these things, we dare make honest appraisal of our shortcomings. We have not failed. We have succeeded. Because we have been privileged to rely upon generations of men and women ready to serve and to sacrifice, we have magnificently succeeded.

Our gathering here today is in testimony of supreme obligation to those who have given most to make and preserve the nation. They established it upon the dual system of state government and Federal government, each supreme in its own sphere. But they left to the state the main powers and functions of determining the form and course of society. We have demonstrated in the time of war that under the Constitution we possess

an indestructible union. We must not fail to demonstrate in the time of peace that we are likewise determined to possess and maintain indestructible states. This policy can be greatly advanced by individual observance of the law. It can be strongly supplemented by a vigorous enforcement of the law. The war which established Memorial Day had for its main purpose the enforcement of the Constitution. The peace which followed that war rests upon the universal observance of the Constitution. This union can only be preserved, the states can only be maintained, under a reign of national, local, and moral law, under the Constitution established by Washington, under the peace provided by Lincoln.

### THE DUTY OF THE COURTS<sup>1</sup>

I pass now to notice some questions which may arise from the manifest effort to concentrate power in the United States and to lessen the powers of the respective states. Ever since the Civil War many have spelled nation with a big N, and there have been constant efforts to enlarge the activity, if not increase the powers, of Congress. The centralizing tendency has been marked. It is not unnatural. It harmonizes with the consolidating spirit of business, the unifying movement in all the activities of life. In matters over which it is manifest that Congress has no power under the Constitution, there is much clamor to so amend that instrument as to invest it with the desired control. Polygamy must be stamped out, and as only national action will reach everywhere in the republic the Constitution must be amended so as to grant full control to the nation. Uniformity in the matter of marriage and divorce is desirable. The states do not agree in establishing such uniformity, therefore let by constitutional amendment Congress be given

<sup>1</sup> By Justice David J. Brewer. *Scribner's Magazine*. 33: 280-1. March, 1903.

power to compel it. Commerce between the states is now subject to congressional regulation, that within each state under its control, but those two branches of commerce are so interwoven as to produce much confusion and irritation. If all power in respect to commerce were taken away from the states and the entire control both of that between the states and that within the states vested in Congress, a desirable uniformity could be obtained, and in this direction is a clamor for a change in the organic law. The trusts are a dangerous factor in our commercial and political life. The states are not adequate to suppress them, hence the Constitution should be amended and full power over them vested in Congress. And so I might go on enumerating others. I simply mention these, not as suggesting matters for judicial decision, for under the power of amendment reserved in the Constitution the people may, if they see fit, engraft any of them upon the organic law and the courts have nothing to say. However wise or unwise any of these changes may be, if the people will it and amend the Constitution in the appointed way, that is the end of the matter.

But judicial questions may arise from efforts under the Constitution as it is to secure action by Congress in some one or other of these or kindred directions, and action which it is contended the Constitution withholds from the power of Congress and has reserved to the states or the people thereof. And because of the centralizing tendency of the day and the disposition to invoke the efficient action of the national government there will doubtless be many such efforts. But as Chief Justice Chase said in *Texas vs. White*, 7 Wall., 725: "The Constitution, in all its provisions, looks to an indestructible union, composed of indestructible states." And the Tenth Amendment to the Constitution provides that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the

states respectively, or to the people." It is the duty of the Supreme Court, as of all other courts, to enforce that provision of the Constitution as fairly and fully as any other. Any legislation of Congress, however desirable or beneficial it may appear, must, unless it comes within the powers given by the Constitution to that body, be declared invalid. Equally also must any action of a state in attempting to exercise dominion over matters the exclusive control of which is vested in Congress be adjudged unconstitutional. No one can predict the precise legislation coming either from Congress or the state legislatures which will challenge judicial inquiry upon the principles just stated. Both sides have strong adherents. The controversy between national authority and states rights is as old as the government. Hamilton and Jefferson have each today a large following. States rights have always been and still are represented in Congress, and there have always been and still are in both Houses some of the ablest lawyers of the land, who will be careful that no legislation of that body trespasses on the powers of the states. Yet when public feeling is deeply aroused and the efficiency of national action is felt, popular pressure may be so great that Congress yields to it and enacts laws beyond its powers. At any rate, it is not only possible but probable that some of its legislation may be so near the boundary of power as to challenge judicial inquiry. Take, for instance, the Sherman Anti-Trust Act, which was framed with the view of exercising only those powers which are conferred upon Congress over interstate commerce, and yet its application was invoked in behalf of interference with manufactures wholly under state control. So also a difficult problem is to draw the dividing line between the exclusive control which Congress has over interstate commerce and the police powers which are reserved to the states. The reports of the court are full of cases on one side or the other of such line. In no class of

cases has the court been more closely divided. *Leisy vs. Hardin*, 135 U. S., 100, in which the power of a state to forbid the sale in the original package of imported liquor was denied is a well-known illustration. Two cases are now pending in which is challenged the power of Congress to restrain the transportation by express companies of lottery tickets from state to state. The great irrigation problem in respect to the arid lands in the west which is just now attracting legislative attention will very likely produce some sharp controversies in respect to the limits of state and national action. And so I might go on in enumeration. It is safe to say that the antagonism between national authority and states rights which began with the republic and which has become intensified by the vast interests affected by it, will bring into the Supreme Court an increasing number of important and difficult questions. Where millions are at stake the ingenuity of lawyers may be depended on to find some way of entrance to the court of last resort.

### THE EFFORT TO SECURE UNIFORM STATE LAWS<sup>1</sup>

The National Conference of Commissioners on Uniform State Laws is composed of commissioners from each of the states, the District of Columbia, Alaska, Hawaii, Porto Rico and the Philippine Islands. In thirty-three of these jurisdictions the commissioners are appointed by the chief executive acting under express legislative authority. In the other jurisdictions the appointments are made by general executive authority. There are usually three representatives from each jurisdiction. The term of appointment varies, but three years is the usual period. The commissioners are chosen from the legal profession, being lawyers and judges of standing and experience, and teachers of law in some of the

<sup>1</sup> Report of Forty-seventh Annual Meeting of the American Bar Association, 1924. p. 522-4, 536-7, 544-5.

leading law schools. They serve without compensation, and in most instances pay their own expenses. They are united in a permanent organization, under a constitution and by-laws, and annually elect a president, a vice-president, a secretary, and a treasurer. The commissioners meet in Annual Conference at the same place as the American Bar Association, usually for four or five days immediately preceding the meeting of that association. The funds necessary for carrying on the work of the Conference are derived from contributions from some of the states, from appropriations made by the American Bar Association, and contributions from various state bar associations. The record of the activities of the Conference, the reports of its committees, and its approved acts are printed in the annual Proceedings. The approved acts, sometimes with annotations, are also printed in separate pamphlet form.

The origin of the Conference is, briefly, this: In 1889 the American Bar Association appointed a special committee on Uniform State Laws. In 1890 the legislature of the state of New York adopted an act authorizing the appointment of "commissioners for the promotion of uniformity of legislation in the United States," whose duty it was to examine certain subjects of national importance that seem to show conflict among the laws of the several commonwealths, to ascertain the best means to effect an assimilation and uniformity in the laws of the states, and especially whether it would be advisable for the state of New York to invite the other states of the union to send representatives to a convention to draft uniform laws to be submitted for the approval and adoption of the several states. In the same year, a special committee of the American Bar Association, after reciting the action of New York, reported a resolution that the association recommended the passage by each state and by Congress for the District of Columbia and the territories, of a law providing for the appointment of commissioners to confer with commission-



ers from other states on the subject of uniformity in legislation on certain subjects. As a result of the action of New York, of the recommendation of the American Bar Association, and the efforts of various interested persons, the first Conference of Commissioners was held in August, 1892, at Saratoga, New York, for three days immediately preceding the annual meeting of the American Bar Association. Since that time thirty-three conferences have been held. While in the first conference but nine states were represented, since 1912, all the states, territories, the District of Columbia, Porto Rico, and the Philippine Islands have been officially represented.

The object of the conference, as stated in its constitution, is "to promote uniformity in state laws on all subjects where uniformity is deemed desirable and practicable." The conference works through standing and special committees. In recent years all proposals of subjects for legislation are referred to a standing Committee on Scope and Program. After due investigation, and sometimes a hearing of parties interested, this committee reports whether the subject is one upon which it is desirable and feasible to draft a uniform law. If the conference decides to take up the subject, it refers the same to a special committee with instructions to report a draft of an act. With respect to some of the more important acts, it has been customary to employ an expert draughtsman. Tentative drafts of acts are submitted from year to year and are discussed section by section. Each uniform act is thus the result of one or more tentative drafts subjected to the criticism, correction, and emendation of the commissioners, who represent the experience and judgment of a select body of lawyers chosen from every part of the United States. When finally approved by the conference, the uniform acts are recommended for general adoption throughout the jurisdictions of the United States and are submitted to the American Bar Association for its approval.



The conference has drafted and approved thirty-eight acts. It has also approved seven acts drafted by other organizations. Some of its own acts have been by conference action declared obsolete and superseded, leaving at present a total of thirty acts being recommended for adoption.

UNIFORM ACTS DRAFTED AND APPROVED BY THE CONFERENCE,  
THE YEAR OF APPROVAL, AND THE NUMBER OF  
JURISDICTIONS ADOPTING EACH ACT

NAME	YEAR OF APPROVAL	No. of JURIS- DICTIONS ENACTING
Acknowledgments Act .....	1892	9
Acknowledgments Act, Foreign .....	1914	7
Aeronautics Act .....	1922	8
Bills of Lading Act .....	1909	26
Child Labor Act .....	1911	4
Cold Storage Act .....	1914	6
Conditional Sales Act .....	1918	8
Declaratory Judgments Act .....	1922	6
Desertion and Non-Support Act .....	1910	18
Extradition of Persons of Unsound Mind .....	1916	8
Fiduciaries Act .....	1922	6
Flag Act .....	1917	9
Foreign Depositions Act .....	1920	10
Fraudulent Conveyance Act .....	1918	12
Illegitimacy Act .....	1922	4
Land Registration Act .....	1916	3
Limited Partnership Act .....	1916	13
Marriage and Marriage License Act .....	1911	2
Marriage Evasion Act .....	1912	5
Negotiable Instruments Act .....	1896	51
Occupational Diseases Act .....	1920	—
Partnership Act .....	1914	16
Proof of Statutes Act .....	1920	7
Sales Act .....	1906	27
Sales Act Amendments .....	1922	12
Stock Transfer Act .....	1909	18
Vital Statistics Act .....	1920	1
Warehouse Receipts Act .....	1906	48
Warehouse Receipts Act Amendments ..	1922	4
Wills Act, Foreign Executed .....	1910	7
Wills Act, Foreign Probated .....	1915	4
Workmen's Compensation Act .....	1914	2

Total—30.

An Act Relating to the Execution of Wills; approved 1892 and again in 1895.

Adopted in Utah, with modifications, in 1907.

Superseded in 1910 by Uniform Foreign Executed Wills

Act which is identical with the old act of 1895.

An Act Relative to the Probate in this State of Foreign Wills; approved 1892 and again in 1895. Adopted in Massachusetts, Michigan, New York, Utah,<sup>1</sup> Washington, Wisconsin, Alaska.

Superseded in 1915 by Uniform Foreign Probated Wills Act.

An Act as to Promissory Notes, Checks, Drafts, and Bills of Exchange (Day of Grace); approved 1892. Adopted in Indiana, Iowa, Maine, Philippine Islands.

Superseded by the Uniform Negotiable Instruments Act.

A Table of Weights and Measures; approved 1892. Obsolete.

An Act to Establish a Law Uniform with the Laws of Other States Relative to Divorce Procedure and Divorce from the Bonds of Matrimony; approved 1900.

Superseded in 1901 by the two following Acts:

An Act to Establish a Law Uniform with the Laws of Other States Relative to Migratory Divorce. Adopted in Wisconsin.

An Act to Establish a Law Uniform with the Laws of Other States Relative to Divorce Procedure and Divorce from the Bonds of Matrimony. Adopted in Delaware and Wisconsin.

The last two acts are superseded by An Act Regulating Annulment of Marriage and Divorce, approved in 1907.

An Act to Establish a Law Uniform with the Laws of Other States Relative to Insurance Policies; approved 1901. Obsolete.

Compulsory Work Act; approved 1918. Obsolete.

As an aid in promoting uniformity of judicial interpretation of the various acts, the conference has fortunately secured, through the efforts and able editorship of the late Commissioner Charles Thaddeus Terry, of

<sup>1</sup> Adopted with modifications.

New York, chairman of the Committee on Uniformity of Judicial Decisions, the publication in a single volume by Baker, Voorhis & Co., of New York city, of the Uniform Acts with full annotations.

The real significance of this tabulation will perhaps be made more apparent when it is noted that, while the total legislative output is thirty uniform acts, because of the theory on which the conference is organized, it has resulted in three hundred and forty-six legislative enactments. In addition to these acts which have been given final approval by the conference numerous other subjects have from time to time been given consideration. Acts have been prepared and adopted which have been subsequently declared obsolete or superseded, as stated, or which have been finally rejected and refused approval. There are twenty-three additional subjects in connection with which uniform acts now are being considered. These subjects are as follows:

1. An Act to Validate Certain Written Transactions Without Consideration and to Make Uniform the Law Relating Thereto.
2. An Act to Validate Transactions Between a Person Acting on His Own Behalf and the Same Person Acting Jointly with Others and to Make Uniform the Law Relating Thereto.
3. An Act Concerning the Discharge of Obligors Bound for the Same Debt and to Make Uniform the Law in Regard Thereto.
4. Uniform Sale of Securities Act.
5. Uniform State Trade-Mark Act.
6. Uniform Trust Receipts Act.
7. Uniform Incorporation Act.
8. Uniform Real Estate Mortgage Act.
9. Uniform Chattel Mortgage Act.
10. Uniform Acknowledgment of Instruments Act.
11. Uniform Arbitration Act.
12. Uniform Act Governing the Use of Highways by Vehicles.
13. Uniform Act for Compacts and Agreements Between States.
14. Uniform Act for Securing Compulsory Attendance of Non-Resident Witnesses in Civil and Criminal Cases.
15. Uniform Drug Act.
16. Uniform Act for the Extradition of Persons Charged with Crime.

17. Uniform Act for Tribunal to Determine Industrial Disputes.
18. Uniform Act for One Day's Rest in Seven.
19. Uniform Act for Joint Parental Guardianship of Children.
20. Uniform Child Labor Act. (Revision.)
21. Uniform Aviation Act. (Questions as to title to superincumbent air.)
22. Uniform Primary Act for Federal Officers.
23. Uniform Act to Regulate Sale and Possession of Firearms.

Drafts of acts with reference to certain of these subjects were considered at the last Annual Conference and referred back to the various committees for consideration and report at this conference as follows:

Uniform [Real Estate] Mortgage Act.

Uniform Chattel Mortgage Act.

Uniform Arbitration Act.

Uniform Act for Joint Parental Guardianship of Children.

Uniform Act for Compulsory Attendance of Non-Resident Witnesses.

Uniform Sale of Securities Act.

## ENCROACHMENTS OF THE STATES AND PRIVATE INTERESTS<sup>1</sup>

In the early part of the nineteenth century there was fear and danger that the union of the states was as a rope of sand and would fall apart. Today there is more reason to fear that the several states and the local self-government which they represent will, for all practical purposes, disappear from our politics as distinct entities and be swallowed up in one all-embracing Federal power. The states not only seem inclined to allow, but in many instances are anxious voluntarily to surrender, to the Federal government the discharge of duties and the exercise of powers and privileges reserved to them by the Constitution, especially when the exercise of those powers involves the expenditure of money. They are also today either soliciting or acquiescing in a degree of

<sup>1</sup> By James A. Tawney. Memorial address on the battlefield of Gettysburg, May 30, 1907. Printed in *Congressional Record*. 42: 5749-52. May 5, 1908.

Federal supervision over their domestic affairs that less than half a century ago would have led to revolution had the Federal government attempted to force such supervision upon them.

Much of the Federal legislation now being enacted, especially that creating new services in respect to the local affairs of the people, would not twenty-five years ago have been tolerated by the states at whose instance, through their representatives in both Houses of Congress, such legislation is now demanded. Even private interests, interests entirely outside of state and Federal governmental functions are, through the activities of the Federal bureau chiefs, aided by the people of the states, seeking Federal legislative authority and Federal appropriations with which to develop local industries for the benefit of private enterprise.

The recent surrender by the southern states of the exercise of the right reserved to them by the Constitution to maintain control, and regulate local quarantine, primarily because of the expense incident to the maintenance of an efficient state quarantine; the practical surrender to the Federal government recently made by the state of Maryland of sovereignty over her oyster beds, that the state might be relieved of the cost of an accurate and necessary survey; the Federal inspection of the products of private manufacturing establishments and the sanitary inspection and control of the establishments themselves, the Federal inquiry into the physical, mental and social conditions surrounding women and child labor in all local industrial occupations, with a view ultimately to securing national legislation to regulate domestic occupation; the inspection of cattle, of insects, and of all agricultural products; the investigation of soils, in which the Federal government has no interest; the care and disposition of timber on state lands set aside by the states as forest reserves; the actual breeding of

horses and cattle, primarily for the benefit of the few fancy stock raisers of the country; the making of topographic and geological surveys of states in which the government does not own a foot of unoccupied mineral or agricultural land; the making of topographic surveys of cities and counties, primarily for the benefit of municipalities, private owners of waterworks, and interurban and other electric railways; the free testing of coal by the Federal government for the benefit of private owners of coal mines to determine its quality in heat units and the best and most economical utilization of the by-products; the free testing of building materials for the benefit of private individuals, contractors, and consulting engineers; the work of gauging streams that are non-navigable in states where the Federal government owns no land and therefore has no jurisdiction or control over the streams gauged, a work which, as testified to by the former director of the Geological Survey, is performed for the benefit of municipalities and "primarily for the benefit of prospective investors in water powers." These and many other undertakings which belong exclusively to the states or private interests to do and to pay for, but which have been authorized by Congress and must be paid for from appropriations made from the Federal Treasury, exceed the legitimate functions of the Federal government as conceived by the founders of our political institutions and as declared by them in the Constitution of the United States.

To illustrate the unprecedented growth of Federal supervision and control over the local affairs of the people at the solicitation or with the consent of the states, I will call your attention to the extent of the special agent and inspection service ten years ago and at the present time. It is through this service that supervision and control over the domestic affairs of the people is exercised by the Federal government. In 1896 the inspectors and special agents, including those employed

in the Treasury, the Post-office, and the Interior Departments, where that service is legitimately employed in protecting the revenue, the mails, and the public domain, numbered, all told, one hundred and sixty and this service cost the government in 1896, in round numbers, \$1,300,000. In 1907 we are employing an army of three full regiments of inspectors and special agents—three thousand men—and this service is now costing the American people about \$9,000,000, while the full quota heretofore authorized has not yet been appointed or appropriated for. The number of men employed in this service in 1907 is therefore more than eighteen times greater than in 1896, and the cost has increased about 700 per cent in ten years.

We hear it said by some that whatever enters into or concerns interstate commerce and whatever affects the welfare of the people of more than one state logically falls within the provisions of the national government, and this is made the apology for such authorizations and expenditures as I have referred to and for many other demands upon the Federal Treasury which the Congress has not yet seen fit to grant. But can you name a single important matter which does not affect the people of more than one state? Is there any phase of any great industry which does not come within the scope of interstate commerce? In short, is there any important private undertaking these days which cannot upon some such pretext be brought within control of the Federal power? And yet this is the tendency of the times, the growth of which during the last decade can be comprehended only by a careful analysis of national legislation and the aggregate annual expenditures of the Federal government. If this tendency is not checked and the states continue to surrender the exercise of their reserved powers, or fail to exercise them in harmony with the interests of their sister states, then the Federal government, as a *dernier ressort*, may be com-



pelled to assume practical control over the states and the affairs of their people. In that case, with the vast and varied local and national interests of a hundred or a hundred and fifty millions of people, how long would it be before the task of government would become so complex and the financial burden so stupendous that of its own weight our splendid system of government would fail?

I grant you that it is more difficult now than formerly to draw a line between Federal and state authority, and between Federal and state expenditures; but it is not an insurmountable obstacle to the continuance of our dual system of government, nor should this difficulty be made the pretext for the Federal absorption of the functions of the states in respect to local self-government. But I would call your attention to the fact, and endeavor to impress upon you the direction in which all this is tending. The inclination on the part of the states to let the Federal government exercise the rights reserved to them is greatly weakening the powers of the states. What is infinitely worse, it is weakening the respect of the people for the authority of the states. It is also causing the people to ignore and forget all those wise considerations which led the founders of our government to provide for local self-government by reserving to the state all governmental powers not expressly conferred by the Constitution upon the Federal government.

It has been suggested that the reason for this practical change in our system of government is to be sought in the imperialistic aggressiveness of the party now in control of the national government. But let us not deceive ourselves with shallow reflections. The real reason lies deeper than this. The tendency on the part of the states to surrender the exercise of powers belonging to them and the willingness of the Federal government to assume such exercise, together with the

burdens incident thereto, is not peculiar to any political party nor to any particular section of our country. It exists in all parties and in every section of our fair land. Let him who doubts this statement examine the record of the vote of the representatives of the people in the House and the record of the vote of the representatives of the states in the Senate. He will find that when there is a demand, either from the people or from the states, for the authorization of a new Federal service, a service which belongs to the states or to private interests to do, and an appropriation from the Federal Treasury to pay for the same, there will almost always be found in both Houses of Congress a majority composed of men of all parties and from all sections of the country who do not even pause to inquire whether the proposed authorization and expenditure falls within the legitimate function of the Federal government. Their only concern is whether the revenues will be equal to the consequent increased appropriations; and even this consideration has but little weight, especially if their state or any of their people are to be the beneficiaries.

The true reason, my friends, why the people are willing to let the national government perform and pay for so many things which properly fall within the obligations of the states is found in the fact that they do not realize that they are themselves paying for the things which the national government pays for. The Federal revenue is secured by indirect taxation, while the money in the treasuries of the several states is secured by direct taxation upon the property of the people.

When any state increases its appropriations for any purpose, every legislator knows that that means an increase in the direct tax upon the people. Moreover, he knows that the people know this and that they watch with zealous care the tax rate which they must pay in cash from their own pockets. The legislator is slow to expose himself needlessly to the criticism and disappro-

bation of his constituents. Therefore needed legislation is postponed because of the expense it involves, and the Federal government is appealed to, whenever possible, through the President, through the people's representatives in Congress, and through the various departments and bureaus of the government. From my experience I can say that the departments and bureaus of the Federal government are at all times eager to enlarge the sphere of their activities and powers by taking on new services and securing increased appropriations. When popular demands are strong enough and it has become obvious that the states will not severally or jointly undertake obligations belonging to them, though seriously needed, the experience of the last ten years shows that the Federal government, through its legislative and executive departments, is only too willing to undertake such responsibilities and relieve the states of the burdens they involve.

My friends, our dual system of government is threatened today by the tendency of the states thus to put upon the national government the burden of administering their local affairs, and this tendency is constantly increasing as the result of the failure on the part of the states to perform their functions of local self-government, and in this failure they are encouraged by a sentiment created by the press of the country, teaching the people to believe that if the state legislatures do not act, "the question as to whether such legislation belongs in the field of the Federal government will sink to a purely academic question."

I do not plead for states rights. I plead for the right and the duty of the Federal government to protect itself and its treasury against the encroachments of the states and private interests upon its powers, its duties, and its revenues. Where will this tendency end? To what result, think you, does it naturally and inevitably lead? Whither are we going in this centralization of

Federal power and mutilation of local self-government? I lay no claim to prophetic powers, but I bring to you the thought of many of the ablest men in the public service today, when I say that we are unconsciously drifting toward a highly organized, bureaucratic form of Federal government, such as has become the bane of most of the old world governments of Europe. We are, either consciously or unconsciously, being drawn away from the simple and sublime ideals of local self-government, which not only gave shape to, but enabled us to adopt, the Constitution and have given unique significance to our political history up to the present time.

The remedy for this tendency, which we cannot much longer look upon with indifference, lies in the simple application of the golden rule by each state to itself.

The only possible remedy lies in each state taking upon itself the burden of enacting all needful legislation and administering its own affairs within the rights and powers which it possesses, and in each state so legislating and administering its affairs that other states may do likewise without injury to any. The individual state should not only rise to the legislative needs of its own people in respect to local self-government, but should also consider what is deemed needful for the people of other states and act accordingly. Unless this is done, unless the states can thus join hands in the wise discharge of all the obligations devolving upon them under our dual form of government, it is inevitable that some of the fundamental features of our present system of government must sooner or later be abandoned. For it is certain that a people, believing as we do in self-government, will not long tolerate a condition of affairs in which the states fail either to exercise the rights reserved to them for the benefit of their own people or to exercise these rights in harmony with each other and for the best interests of all.

It has been said by a member of the Senate of the United States that such unity and harmony between the states is not possible; that it cannot be attained without the interference of the Federal government. This may be true; but, my friends, no such doubt entered the minds of the makers of our Constitution, or was ever expressed by them or by anyone else until within the last decade. They had supreme confidence in the power of the states to legislate in harmony with and for the best interests of the country as a whole. If their confidence was unfounded, if we must, with the further development of our industries, our commerce, and our political institutions, fall back upon the strong arm of the Federal government to support and sustain us, then must the political significance and importance of our state boundaries become less with time and the splendid conception of local self-government, which has guided and restrained our lawmakers heretofore, be proven a failure.

The vital question, therefore, which confronts the American people today is, whether our dual system of government, in the form conceived and established by its founders, is ultimately to be wrecked upon the rock of a highly centralized bureaucratic Federal authority, or whether it can endure in the form originally created as the nation moves on to greater heights of development in industry, in wealth, in power, and in international influence.

Here, then, let us renew that high resolve, uttered upon this spot forty-four years ago, by the immortal Lincoln, that this government "of the people, by the people, and for the people," in the form in which it was conceived by the founders of the republic, in the form that has made us superior to all governments in the past, in the form for which brave men laid down their lives upon this and many other historic battlefields, shall not perish from the earth.

## BRIEF EXCERPTS

Without antonomous states there can be no federal Union.—*H. M. Cox. Central Law Journal. 67:276. October 9, 1908.*

There is no longer a vestige of pure Jeffersonism in our politics.—*Edward Stanwood. Atlantic Monthly. 53:701. May, 1884.*

Almost every great internal crisis in our affairs has turned upon the question of state and federal rights.—*Woodrow Wilson. North American Review. 187:685. May, 1908.*

The constitution, in all its provisions, looks to an indestructible union, composed of indestructible states.—*United States Supreme Court. Texas vs. White et al. 7 Wallace 700.*

By a steady movement the national government has encroached upon the sphere ascribed to the states.—*Charles A. Beard. American Government and Politics (fourth edition). p. 442.*

We have long heard much of the intrusion of federal power in the states. Nearly everybody laments it: nearly everybody has pet plans for extending it.—*New York Times (editorial). January 14, 1926.*

It is almost impossible, except when public opinion is wrought up in some extraordinary manner, to change the constitution of the federal union.—*Ellis P. Oberholzer. The Referendum in America. p. 156.*

Railroads, telegraphs, and all the easy modes of intercommunication, have brought the people of the country closer together and have made far less of state lines.—*Independent (editorial). 63:172. July 18, 1907.*

As concerns the general scheme of our government and the general distribution of state and federal powers, I offer no criticism. Our fathers framed wisely in those respects.—*James Schouler. Forum. 18:532. January, 1895.*

No political dreamer was ever wild enough to think of breaking down the lines which separate the states and of compounding the American people into one common mass.—*John Marshall. McCulloch vs. Maryland. 4 Wheat 316.*

The division of powers between the states and the federal government effected by our federal constitution was the normal and natural division for this purpose.—*Woodrow Wilson. Constitutional Government in the United States. p. 183.*

A hundred years ago to contend for state's rights meant to attack and to weaken the constitution: today to contend for state's rights means to defend and strengthen the constitution.—*Nicholas Murray Butler. Building the American Nation. p. 284.*

The cases of executive aggression, however, involving an actual overstepping of constitutional boundaries, have been few, and when they have occurred their seriousness has often been exaggerated.—*George W. Alger. The Old Law and the New Order. p. 8.*

The American system is one of complete decentralization, the primary and vital idea of which is that local affairs shall be managed by local authorities, and general affairs only by the central authority.—*Thomas M. Cooley. Constitutional Limitations. p. 223.*

The tendency, though much criticised, is strongly toward centralization. The federal government, almost inevitably, steadily extends its control and its legislation



over whole domains formerly left too exclusively to state action.—*New Encyclopedia of Social Reform*. p. 157.

It is my duty and my oath to maintain inviolate the rights of the states to order and control, under the Constitution, their own affairs by their own judgment exclusively. Such maintenance is for the preservation of that balance of power on which our institutions rest.—*Abraham Lincoln*.

If the power to regulate commerce between the states can be stretched to include the regulation of labor in mills and factories, it can be made to embrace every particular of the industrial organization and action of the country.—*Woodrow Wilson. Constitutional Government in the United States*. p. 179.

Since the foundation of this government there has been a steady increase in national powers and activities; but not until recently has this increase endangered the efficiency of the national government and the existence of the federal system.—*Walter F. Dodd. Yale Law Journal*. 32:452. March, 1923.

The most heinous crime of civilization is child labor. It is a sin, not only against all social and economic laws, but against nature itself. . . . Child labor is even yet [1902] used elsewhere, but its use is now especially scandalous in many cotton mills in the southern states.—*World's Work*. 4:2475. September, 1902.

After the adoption of the constitution the doctrine of state's rights was invoked, with but few exceptions, to promote the economic interests of the states or sections [or classes] invoking it as against the national government or other states [or classes].—*Marvin B. Rosenberg. North American Review*. 218:148. August, 1923.

The several states are not alike. I would not have them try to be alike. They differ in habits, in traditions,

in ideals, in needs, and in deeds, and this is as it should be. These differences are the very essence of life, the best guarantee of national progress.—*Governor Albert C. Ritchie. Address at the Boston City Club. p. 20.*

Criticisms of state inefficiency, as compared with federal efficiency, are on many tongues, and there seems to be an increasing contempt of state authority coupled with a constantly growing respect for that of the United States.—*R. C. Minor. Report of the Twenty-Third Annual Meeting of the Virginia State Bar Association, 1911. p. 196.*

The state governments are to a certain extent responsible for this movement to concentrate power in the hands of the government at Washington by reason of failure to exercise their reserved powers, and promote by wise and uniform state legislation the great business interests of the country.—*Charles F. Libby. Lawyer and Banker. 3:417. December, 1910.*

A national government for national affairs and state governments for state affairs is the foundation rock upon which our institutions rest. Any serious departure from that principle would bring disaster upon the American people and upon the American system of free government.—*Justice John M. Harlan. National Corporation Reporter. 36:101. March 5, 1908.*

There is a widespread sentiment in the western states, which have been the scene of most of the anti-trust legislation, that New Jersey in framing her laws so as to facilitate the formation of monopolistic combinations to prey on the nation at large has been guilty of little less than treachery to her sister states.—*S. McReynolds. World's Work. 4:2529. September, 1902.*

If, in the opinion of the people, the distribution of the constitutional powers be in any particular wrong, let it

be corrected in the way which the Constitution designates. But let there be no change by usurpation, for this, though it may in one instance be the instrument of good, is the ordinary weapon by which free governments are destroyed.—*George Washington. Farewell Address.*

The form of government devised by the great men who drafted the constitution of the United States was brought into being under conditions more dissimilar from those of today, so far as they relate to trade and commerce, than those conditions themselves were to the period when Rome governed the world.—*Walter G. Smith. Annals of the American Academy. 52:67. March, 1914.*

I insist that its [the United States Supreme Court's] fundamental rules of construction tend to the gradual whittling away of the reserved powers of the state, and encourage and promote the usurpation by Congress through a process, gradual but now rapidly accelerating, of repeated invasion by indirection of the sphere of state action.—*H. M. Cox. Central Law Journal. 67:277. October 9, 1908.*

Undoubtedly the powers of the federal government have grown, have even grown enormously, since the creation of the government; and they have grown for the most part without amendment of the constitution. But they have grown in almost every instance by a process which must be regarded as perfectly normal and legitimate.—*Woodrow Wilson. Constitutional Government in the United States. p. 192.*

Obviously the growth of federal authority at the expense of the state governments has been one of the steadier tendencies in our politics. The old state's rights theory of sovereignty, and even the more moderate perception of the state as its own administrator, have yielded to an increasing centralization. It has been a process

almost without intermission.—*Charles Merz. New Republic. 10:256. March 31, 1917.*

Even the best-drawn instrument [written constitution] is sure to have omitted some things which ought to have been expressly provided for, to have imposed restrictions which will prove inconvenient in practice, to contain provisions which turn out to be susceptible of different interpretations when cases occur raising a point to which the words of those provisions do not seem to be directly addressed.—*James Bryce. Studies in History and Jurisprudence. p. 193.*

If the southern states, simply because they desire prohibition for themselves, are going to cast their weight upon the scales to fasten prohibition upon those states, be they few or many, that do not wish to live under that regime, they will remove the last vestige of support for any protests that they may hereafter wish to set up against federal encroachment upon their control of their own affairs.—*Fabrian Franklin. North American Review. 207:234. February, 1918.*

An immense revolution in economic life has taken place since the adoption of the constitution. An unforeseeable mobility of population, commerce, and industry has characterized the century since the industrial revolution got well under way. Organized capital has risen to the rank of an economic political power of the first magnitude; organized labor has gained a status that to the founders of the constitution would no doubt have seemed most dangerous.—*New Republic. 41:109. December 24, 1924.*

The state rights theory of Calhoun involved the right to nullify those acts of the federal government which were specifically authorized by the constitution, and to withdraw from the Union. That theory has long been dead and can never be revived. The state rights theory

of today is not aggressive but defensive. It is simply an insistence upon the right of the states to the powers specifically granted to them or specifically reserved to them by the constitution.—*North American Review*. 21: 440-1. *April*, 1920.

A hundred years ago the only media of interstate communication were coastwise sailing vessels and the occasional stage coach that lumbered across state lines. But today steam and electricity are welding the states together, commercially and industrially. With the destruction of the state as industrial entities will follow, in the fullness of time, their destruction as political entities. Historically, federalism is like the grave; it takes but it does not give.—*Alfred P. Dennis*. *Atlantic Monthly*. 96: 529. *October*, 1905.

Of the political questions which engaged attention over the whole country from time to time from the adoption of the constitution to the close of the Civil War, almost all bore some relation to the institution of slavery and derived their real vitality from that connection. Slavery depended on state laws. Unless the authority of each state to allow and regulate it were preserved, its countenance would be endangered. This was largely the source of the "State Rights" cry.—*Simeon E. Baldwin*. *The American Judiciary*. p. 376.

The relations between the federal and state governments are of such momentous importance and never-ending interest, that frequent recurrences to the fundamental principles on which they rest, and on which the stability of our dual system of government depends, cannot but have a tendency to preserve the spirit of liberty, to maintain free government, and to perpetuate American institutions.—*William Lindsay*. *Report of the Twenty-eighth Annual Meeting of the New York State Bar Association*, 1905. p. 266.

We have a written constitution, which does not, like an unwritten one, change from time to time to keep in harmony with the progress of events. Our constitution does not march like an unwritten constitution. It does not expand even with the existence of an undisputed necessity for its expansion. Its meaning is the same today as it was yesterday, and will remain the same until changed by amendment.—*William Lindsay. Report of the Twenty-eighth Annual Meeting of the New York State Bar Association, 1905. p. 245.*

The content of the federal authority over commerce has not been enlarged since the beginning, and to understand its scope we recur to the classic definition of Marshall; but there has been a profound change in the disposition to use that authority. From the outset, Congress exercised its power somewhat broadly with respect to foreign commerce, but it did little in the interstate field until a short time ago.—*Charles E. Hughes. Proceedings of the Thirty-ninth Annual Meeting of the New York State Bar Association, 1916. p. 268.*

One of the recent treaties against which vehement objection has been made is the Migratory Bird Treaty, by which the United States and Canada establish what is practically an international game law, relating to migratory birds and regulating the seasons in which and the methods by which they may be captured. The objection to this treaty is that it purports to regulate the taking of game birds, whereas such regulation, it is argued, is vested in the states alone as part of their reserved powers.—*Central Law Journal (editorial). 9:19. January 9, 1919.*

The question of the relation of the states to the federal government is the cardinal question of our constitutional system. At every turn of our national development we have been brought face to face with it, and no

definition either of statesmen or of judges has ever quieted or decided it. It cannot, indeed, be settled by the opinion of any one generation, because it is a question of growth, and every successive stage of our political and economic development gives it a new aspect, makes it a new question.—*Woodrow Wilson. Constitutional Government in the United States. p. 173.*

In matters in which all are equally interested the federal government acts for all. In matters in which localities only are interested no other power is permitted to interfere. In national affairs we are a unit; in local matters we represent forty eight distinct and independent units, with laws, institutions, social customs, religious affinities and aspirations, as distinct as the billows. The strength of our government has been from the beginning in the recognition of these two principles,—not antagonistic, but mutually helpful.—*Henry S. Tucker. North American Review. 199: 568-9. April, 1914.*

Still alive today is the conflict that raged even before the union of the states, when they hesitated to surrender any part of their sovereignty to the federal government. The hesitation and delay in ratification of the constitution reflected the fear of the states that their entry into the union might be a substantial surrender of rights which the people of the states were loath to lose. There is still apprehension on the part of the states which will continue so long as we maintain our present form of government.—*George S. Silzer. Governor of New Jersey. Address before the New York City Bar Association, December 17, 1925.*

The United States of America differs from any other government heretofore established in that it is neither an imperial state, nor a parliamentary state, nor a class government state, but a federal republic with a government of limited and carefully defined powers. The great



advantage of a federal form of government, particularly when the area over which it extends is so great as in the case of the United States, is, first, that it affords the largest possible measure of local self-government and local responsibility: and, second, that it affords flexibility in the adaptation of social and political institutions to differing economic, climatic, and geographic conditions.—*Nicholas Murray Butler. The Faith of a Liberal. p. 203-4.*

The most marked feature of centralization to be observed in the United States has been the transformation of an aggregation of states, holding themselves free, sovereign, and independent under the Articles of Confederation, into a nation, in which the state has sunk almost to the position of a unit of local government. The underlying forces in this transformation have been economic; the development of new western states having none of the institutional traditions of the old eastern commonwealths; the complete freedom of trade among the states; the revolution in the facilities for communication and travel; and the development of nationwide corporations and business undertakings.—*Charles A. Beard. Cyclo-pedia of American Government. Vol. 1. p. 239.*

Unless this tendency towards the magnifying of federal jurisdiction and minimizing of the states shall be checked, we shall find ourselves under an imperial system which, whatever be its advantages, is essentially bad and fraught with danger to American ideals. There would seem to be but one antidote for the evil of exaggerated federal jurisdiction and that rests in the principle of uniform legislation by the states. Wholesale and many branches of retail business have [sic] long since ceased to operate within a single state, and if it cannot find relief from the divergent laws of the different states

on the same subjects, it will demand and will receive the boon from a changed constitution.—*Walter G. Smith. Annals of the American Academy.* 52:68. March, 1914.

Our government has undoubtedly centralized a good deal since the beginning of the [nineteenth] century; for the greater facility of communication between the different parts of the union, the formation of vast corporations comprising several states in the scope of their operations, and the consequent industrial development of the country, demand from the federal government the exercise of powers which were far less important ninety years ago. There exists unquestionably a tendency to centralization, which all citizens who care for the constitution should watch with a jealous eye; but it is a tendency very easy to exaggerate, and not yet [1889] developed to such an extent as to impair the political power and independence of the states.—*A. Lawrence Lowell. Essays on Government.* p. 48.

Democracy—government by the people, or directly responsible to them—was not the object which the framers of the American constitution had in view, but the very thing which they wished to avoid. In the convention which drafted that instrument it was recognized that democratic ideas had made sufficient progress among the masses to put an insurmountable obstacle in the way of any plan of government which did not confer at least the form of political power upon the people. Accordingly the efforts of the Constitutional Convention were directed to the task of devising a system of government which was just popular enough not to excite general opposition and which at the same time gave to the people as little as possible of the substance of political power.—*J. Allen Smith. The Spirit of the American Government.* p. 29-30.

There is a widespread but not at all well-founded impression that state government in the United States has been tolerably satisfactory. One reason for this, no doubt, may be found in the fact that municipal government was for many decades a far more conspicuous failure and hence engrossed the attention of reformers. The weakness of state government, moreover, has been to some extent screened and retrieved by the relative excellence of the federal system. By the steady expansion of its authority the national government has taken over and has administered with comparative efficiency many functions which, had they been left to the states, would undoubtedly have been handled so unskillfully as to bring the inaptitudes of state government into a far bolder relief.—*William B. Munro. The Government of the United States. p. 522.*

It is true that the national power, as now exerted, covers a wider field of action than it did in the early days of the republic, but that does not prove, as the pessimist would have us believe, that the government has usurped powers that do not belong to it and has entered the domain reserved by and for the states. It proves only that the nation has from time to time, as the public interests demanded, brought into active operation powers which Congress had not previously chosen to exert. So vast has been the increase in our population and so diversified and extended have become our industrial interests, that occasions must necessarily arise from time to time for a more intimate connection between the government of the Union and the commercial and other affairs of the people than perhaps the fathers ever dreamed of.—*John M. Harlan, Justice United States Supreme Court, in an address in New York, December 23, 1907.*

It was not the "will of the people" and their desire to "get government closer to themselves" that created the "colonies" which developed into the "states." On the

contrary, it was the English king who did this. And the British monarch governed these colonies *separately*. The royal policy was to keep the colonies from uniting. It was easier for the British throne then to rule the people if they could be kept in distinct "colonies," than if the spirit of unity developed among them, just as it is easier for exploiters of the people now to rule them if the people can be kept in distinct "states" than if the spirit of nationality unites them. So each colony was encouraged to consider itself as a *separate being* from the other colonies. This was the origin of the colonies—this the germ of the "state's rights" idea. The seed of "state's rights" was planted in American soil by the British kings.—*Albert J. Beveridge. Reader. 9:466. April, 1907.*

Even before the civil war, the trend was toward centralization, and from then till now [1906] Congress has been lavish in expenditures within the several states for the performance of tasks which the states might perform. Even the present minority [Democratic] party, though vigorously denouncing the policy of centralization, furnished supporters for every pending measure looking thereto. The law recently enacted giving the national government supervision of quarantines, received in both houses of Congress support of every avowed apponent of centralization. Several of the Gulf States sold or leased to the government, and others discontinued, their quarantine stations, thus voluntarily surrendering to the Government a prerogative which the state might appropriately exercise. The Pure Food Bill, giving to the National Government the right to enter the several states and examine into the sanitary condition of packing houses and other manufactories of food products, also had the support of avowed opponents of centralization. The creation of a Commissioner of Corporations in the Department of Commerce, with jurisdiction to investigate all controversies between the employer and the em-

ployed, received the hearty support of most, if not all, of those most outspoken against the principles involved. Not only have they supported every measure thus far passed, but several of the most prominent adherents of the party, which makes opposition to centralization a paramount issue, openly advocate going to the limit of centralization, and propose that the National Government construct and maintain highways through all the states; and some even advocate government ownership of railroads.—*Leslie M. Shaw. Current Issues. p. 9-10.*

Senator Beveridge refers to the child labor law, for which he stands sponsor. While it is true that the manufacturing interests which oppose this law are hiding behind the "reserved rights of the states," and while it is true that many Democrats are opposing the senator's bill, some of them because of the influence of manufacturers employing child labor, and some on theoretical grounds, I think I can speak for a considerable element of the Democratic party when I say that the senator's bill does not in the least trespass upon state rights. The power of congress over interstate commerce is complete. This power is not only complete, [Mr. Bryan was wrong about this, for the Supreme Court afterwards held the child labor law unconstitutional] but its exercise is necessary, the various states being impotent when it comes to matters of interstate commerce. I have given to Senator Beveridge's bill whatever support I could. It is right in principle; it is necessary, and it does not interfere with the reserved rights of the states. It permits each state to regulate its own affairs in so far as its action affects state commerce only, but the bill recognizes the right of congress to determine the conditions upon which merchandise shall enter interstate commerce. The principle embodied in the senator's bill is a most important one. At this time he is applying it to goods produced by child labor; more than six years ago the Demo-

cratic platform demanded the application of this principle to the trust question. I had this principle in mind when in my former article I said it is not necessary to interfere with the rights of the states in order to enact measures necessary for the annihilation of the trusts. Senator Beveridge should be given credit for his championship of the cause of the children, and I wish him every success in his efforts to secure the passage of the Beveridge bill.—*William J. Bryan. Reader. 9:465. April, 1907.*

It has sometimes been said that the Union was in its origin a league of sovereign states, each of which surrendered a specific portion of its sovereignty to the federal government for the sake of the common welfare. Grave political arguments have been based upon this alleged fact, but such an account of the matter is not historically true. There never was a time when Massachusetts or Virginia was an absolutely sovereign state like Holland or France. Sovereign over their own internal affairs they are today as they were at the time of the Revolution, but there was never a time when they presented themselves before other nations as sovereign, or were recognized as such. Under the government of England before the Revolution the thirteen commonwealths were independent of one another, and were held together, juxtaposed rather than united, only through their allegiance to the British crown. Had that allegiance been maintained there is no telling how long they might have gone on thus disunited; and this, it seems, should be one of our chief reasons for rejoicing that the political connection with England was dissolved when it was. A permanent redress of grievances, and even virtual independence such as Canada now enjoys, we might perhaps have gained had we listened to Lord North's proposals after the surrender of Burgoyne; but the formation of the Federal Union would certainly have been long postponed, and when we realize the grandeur



of the work which we are now doing in the world through the simple fact of such a union, we cannot fail to see that such an issue would have been extremely unfortunate. However this may be, it is clear that until the connection with England was severed the thirteen commonwealths were not united, nor were they sovereign. It is also clear that in the very act of severing their connection with England these commonwealths entered into some sort of union which was incompatible with their absolute sovereignty taken severally. It was not the people of New Hampshire, Massachusetts, and so on through the list, that declared their independence of Great Britain, but it was the representatives of the United States in Congress assembled, and speaking as a single body in the name of the whole. Three weeks before this declaration was adopted, Congress appointed a committee to draw up the "articles of confederation and perpetual union," by which the sovereignty of the several states was expressly limited and curtailed in many important particulars. This committee had finished its work by the 12th of July, but the articles were not adopted by Congress until the autumn of 1777, and they were not finally put into operation until the spring of 1781. During this inchoate period of union the action of the United States was that of a confederation in which some portion of the several sovereignties was understood to be surrendered to the whole. It was the business of the articles to define the precise nature and extent of this surrendered sovereignty which no state by itself ever exercised. In the meantime this sovereignty, undefined in nature and extent, was exercised, as well as circumstances permitted, by the Continental Congress.—*John Fiske. The Critical Period of American History. p. 90-2.*





## AFFIRMATIVE DISCUSSION

### PRESENT NEEDS<sup>1</sup>

The fourth great problem of the constitutional law of the present, as I view these problems, concern chiefly, if not wholly, the United States. It is the question of extending the legislation of the central government further into the domain of private law, especially in the regulation of commerce and matrimonial relations. The other states [that is, nations or countries] having Federal governments, except Mexico, and, of course, all the states [countries] having centralized governments, have assigned these subjects to the legislature of the general government; and Mexico has gone much further than the United States in this direction.

Whatever may have been natural a century ago, when the settled parts of the commonwealths of this union were separated from each other by comparatively impassable districts of primeval forest and there was comparatively little intercourse between them, now, when these obstacles have entirely disappeared and intercourse is so active that no man notes his passage from one commonwealth into another, it has become entirely unnatural and scarcely longer endurable that the law governing commerce should not be exclusively national. The existence of the common law as the basis of the law of the commonwealths upon this subject has minimized the difficulty of a great nation getting on with systems of local commercial law; but the differences in detail,

<sup>1</sup> By John W. Burgess. *Political Science Quarterly*. 19: 566-7. December, 1904.

at first hardly noticeable, have now, on account of the vast development in the complexity of these relations, become almost unendurable. This problem should be dealt with by constitutional amendment, if possible. If not, then the United States judiciary must put a much more liberal interpretation upon the existing commerce clauses of the Constitution. The distinctions between commerce "among the states" and commerce within the commonwealths have now become too attenuated to bear the strain much longer. They must go, or the Federal system of government may break down entirely.

It certainly is not necessary for me to enter into any argument at all to show that the scandals of polygamy and divorce, which bring the blush of shame to the cheek of every true American, have their root in the system of local regulation of the subjects of marriage and divorce. The family relations are fundamental in the civilization of a nation. Their proper regulation must rest upon the national consciousness of right and wrong. States rights must give way upon this point, too, if they would stand in regard to those subjects which are not so completely national in their character. In fact the whole system of Federal government, that is, dual government under a common sovereign, is now under great strain, in consequence of the rapid development of nations and of national states. It is a question whether it can stand against the centralizing forces in modern political and civil society. It certainly cannot unless it yields the transfer of some subjects, such as those just mentioned, from local to central regulation. This has been done in Switzerland, in the German Empire, in Brazil, and, in a large degree, in Mexico; and the United States must follow the same course of development or witness soon the same sort of a movement for universal reform as occurred in 1787.

THE NEW NATIONALISM<sup>1</sup>

The new nationalism is simply a later stage in the development of a continually developing nationalism. The relation between the states and the national government was not settled once for all by the written Constitution, and could not be. The Constitution is not like the hoops of a barrel that hold the staves together. Hoops fitted for a barrel of thirteen staves would not serve for a barrel of forty-eight. It is like the bark of a tree that grows with the growth of the tree and expands with its expansion. Chief Justice Marshall, by his interpretation of the Constitution, did almost as much to make it what it is as did its original framers.

Says Joseph H. Choate, in his interesting address on Alexander Hamilton:<sup>2</sup>

For the five years that preceded the adoption of the Federal Constitution the whole country was drifting surely and swiftly toward anarchy. The thirteen States, freed from foreign dominion, claimed, and began to exercise, each an independent sovereignty, levying duties against each other and in many ways interfering with each other's trade. European nations, finding that Congress had no power to protect American trade, proceeded to impose fatal restrictions upon it. They also refused to enter into treaties with the United States because they could not tell whether they were dealing with thirteen nations or with one. This only was sure, that Congress could carry no treaty into effect.

Mr. Choate adds: " 'It is clear to me as A B C,' said Washington, who from his retirement at Mount Vernon watched the course of affairs with the utmost anxiety, 'that an extension of Federal powers would make us one of the most happy, wealthy, respectable, and powerful nations that ever inhabited the terrestrial globe. Without them we shall soon be everything that is directly the reverse.' " In the formation of the Constitution, despite the jealousy of some states and the fears of others,

<sup>1</sup> By Lyman Abbott. *Outlook*. 96: 484-6. October 29, 1910.

<sup>2</sup> *Abraham Lincoln and Other Addresses*. p. 105-6.

this extension of Federal powers was given to the central government, and by that gift the nation was born. But it was never the intention of the founders that it should be always in its cradle; they intended that the Federal powers should grow with the growth of the nation, that it might, as a nation, become happy, wealthy, and respectable, because powerful.

The new nationalism, initiated by Washington in his call for an "extension of Federal powers," was assailed by Calhoun nearly half a century later. Calhoun's contention may be here condensed into a sentence: The powers of the Federal Congress are enumerated powers; if it attempts to exercise any power not in the Constitution enumerated, it transcends its authority, and its act is null and void; and it is for the state which gave the authority to decide whether the authority has been exceeded. This was the doctrine of nullification. Not so, replied Chief Justice Marshall; it is for the Supreme Court of the United States to decide whether that authority has been exceeded. The states did not accept Mr. Calhoun's theory; they have, despite some strong opposition, accepted Chief Justice Marshall's theory. The creation of the union of states constituted the first stage in the development of a new nationalism; the rejection of nullification constituted the second stage in the development of that new nationalism.

A quarter of a century later Jefferson Davis propounded the doctrine of secession. It was at once more logical and more radical than the doctrine of nullification. It was, in brief, this: The union is a union of sovereign states; it is the very essence of this union that it is voluntary; if a state finds itself dissatisfied in the union, it may withdraw; there is no power given to the Federal government by the Constitution to forbid its withdrawal. Not so, replied Abraham Lincoln. This is an indestructible union of indestructible states; the right of self-

preservation is inherent in the nation as in the individual. The defeat of secession and the triumph of unionism as the result of the Civil War constituted the third important stage in the development of the new nationalism.

Prior to the Civil War banking had been conducted by state banks and under state regulation. In 1862 Abraham Lincoln proposed a new extension of Federal powers: "the organization of banking associations under a general act of Congress, well guarded in its provisions," to which associations "the government might furnish circulating notes on the security of United States bonds deposited in the treasury," which notes, "being uniform in appearance and security, and convertible always into coin, would at once protect labor against the evils of a vicious currency, and facilitate commerce by cheap and safe exchanges."

The recommendation was adopted by Congress; and, despite the opposition of special interests and the forebodings of the timid, was approved by the people. Our currency ceased to be a state, and became a national, currency. The creation by the Federal powers of this national currency constituted a fourth stage in the development of the new nationalism.

Thomas Jefferson in 1806 declared that Congress had no constitutional power to appropriate money from the Federal treasury for internal improvements, and proposed a constitutional amendment giving such power. President Polk in 1846 vetoed a bill making such appropriations. "The Constitution has not," he said, "in my judgment, conferred upon the Federal government the power to construct works of internal improvements within the states, or to appropriate money from the treasury for that purpose." At the same time Abraham Lincoln made what was perhaps his most notable speech as a representative in Congress in favor of this "exten-

sion of the Federal powers," and the Republican Party in its first convention in 1856 took in its platform the same ground. This power of the Federal government is now so universally recognized by the nation that probably most of the readers of this article did not know that it had ever been denied; but in fact its adoption and exercise constituted another stage in the development of the new nationalism.

Not until 1873, nearly a century after the formation of the Constitution, was any attempt made in Congress to use the Federal powers granted to it over interstate commerce to regulate the national railways. As late as 1883 President Arthur in his message to Congress regarded the powers of Congress over the railways as a question requiring careful consideration. Not until 1887 was an Interstate Commerce Commission constituted, and then with very scanty powers. Not until 1910 was power given to it to exercise a really efficient regulation. The extension of Federal powers over the highways of the nation constitutes another stage in the new nationalism.

The latest development of the new nationalism is conservation. Conservation is simply the doctrine that the Federal government shall continue to retain the ownership, and therefore the power to control, the forest lands, mineral lands, and swamp lands, and the water power sites which now belong to it.

If the opponents of the new nationalism in the successive stages of its development could have had their way, the Constitution would never have been accepted by the colonies, and the Federal union would not have been formed.

If formed, each state would have been at liberty to decide whether laws enacted by the Federal Congress were constitutional, and to refuse obedience if it disapproved their constitutionality.



If its disapproval had been overruled and any attempt had been made to enforce the law, it could have withdrawn from the union and set up as an independent sovereignty on its own account.

Our currency would have been local and provincial, and in traveling through the United States the traveler would have had to purchase gold or a letter of credit, as in going to Europe.

Our rivers would have remained undredged and our harbors unimproved, except as individual states might attempt some improvements within their own boundaries, and our coast would have resembled that of San Domingo.

Our railways would have oscillated between a policy of cut-throat competition ruinous to the stockholders and of monopolistic combination ruinous to the shippers, and by the habit of giving special rates to favored shippers and favored localities would have built up monopolies from which the people would have been powerless to emancipate themselves.

All the arguments against the extension of Federal powers which we hear in political addresses and read in political journals, and all the fears of Federal centralization which are used to excite popular apprehension of the latest phase of the growing and therefore ever new nationalism, are repetitions of the arguments employed and the fears expressed in every previous stage of national development from the days of George Washington to the present day. And the answer to them can be given almost in George Washington's words: "It is clear to *us* as A B C that the successive extensions of Federal powers have made us one of the most happy, wealthy, respectable, and powerful nations that ever inhabited the terrestrial globe; and without them we should have been everything that is the direct reverse."

CONTINENTAL INTERESTS<sup>1</sup>

Dr. Eliot, president of Harvard University, said that in the National Civic Federation he represented neither capital nor labor, but that great public which invariably pays all the cost of industrial warfare, whether it breaks out openly or is privately compromised; that he had, therefore, the strongest interest in contributing, if possible, to industrial peace. The best legislation that has ever been adopted to promote industrial peace is the Canadian Act of March 22, 1907, called the "Industrial Disputes Investigation Act." Under it no strike is lawful and no lockout is lawful until there has been a public investigation of the causes of the strike and of the lockout. There is no arbitration in it, only investigation, conciliation and publicity, but the primary merit is this, that no strike is legal and no lockout is legal until the public investigation has been held by an impartial authority.

In Canada specified powers belong to the provinces, all others belong to the national government. It is absolutely the reverse with us, but it is an immense object lesson for the community that these two free countries continue to experiment independently on the conduct of free institutions. But Canada has an enormous advantage. Nearly all of the questions which are now important for the prosperity of our country are new. Not one of them arose at all until more than fifty years after the adoption of the Constitution. How is it possible that that instrument, so wise, so wonderful in its day, should provide the means of dealing with questions never imagined for a moment when the Constitution was made. The Federal government of our country greatly needs new powers. It is trying to get them by a stretching process and some experiments in this direction have

<sup>1</sup> *National Civic Federation Review*. 3:11. February, 1908.

turned out pretty well considering the extremely limited nature of the powers which can be twisted out of the Constitution in this manner. When a corporation has power to carry on business over the whole of these United States—to live and work in many states—can state authorities control it?

The real definition of a good labor union is that it is a commercial association. Now, these commercial associations work over the whole country. Is it to be expected that any power but that of the central government can control a commercial association of that sort? All the great commercial associations, whatever you call them—trusts, companies or labor unions—are really in search of the same thing, a monopoly. They very seldom get a complete monopoly, but they often approach it. Now, if there is anything in this country that free men in all countries have abhorred and resisted, it is monopoly; and it does not make much difference what sort of a monopoly it is. Now, these great monopolies, broad as the continent, cannot be controlled by any but a central government, and, therefore, I say that Canada has already one great advantage over the United States, because all these new questions go to their central government.

It is not alone in industrial disputes that we discover the same difficulty. How can the great evil of divorce be dealt with in our land except by the force of the national government? How can the great evil of child labor be dealt with in this land through the efforts of the states? Take the great source of many of our social and industrial evils, the misuse of corporation and association powers; how can they be dealt with except by the force of the central government? I say, therefore, that we should look forward to an increase of national power in all of these directions. The suggestion goes against our cherished fetish of local government, local interest or local representation. We desperately need a

revision of our conception of local interest. The interests called local have entirely changed their nature and scope within the last fifty years, and so, I say, we need to revise our idea of local government, and above all, we need to give up our fear of the extension of national power.

The national government rules today a territory really much smaller than New England was sixty years ago. Not only is the territory smaller for administrative purposes, but we can talk all over it on the instant; we can bring news from every part of it on the instant and we can ride across it in five days, whereas, it used to take three weeks for a student to arrive at Harvard College from central New York; as I have heard a student of that day tell he made the journey in the year 1826, it took him three weeks, and he rode all the way, with all his goods in two saddle bags. So, I say, the national government rules today a much more manageable area than sixty years ago, with infinitely better means of communication. Why, after all from the point of view of a national government, this continent has become a very manageable place and local interests, what are they? They are continental interests.

### LIBERAL INTERPRETATION<sup>1</sup>

Now that the questions of government are becoming so largely economic, the majority of our so-called constitutional cases really turn not upon the interpretation of the instrument itself but upon the construction, the right apprehension of the living conditions to which it is to be applied. The Constitution is now and must remain what it always has been; but it can only be interpreted as the interests of the whole people demand, if interpreted as a living organism, designed to meet the conditions of life and not of death; in other words, if inter-

<sup>1</sup> From an address by President Roosevelt at St. Louis, October 2, 1907.

puted as Marshall interpreted it, as Wilson declared it should be interpreted.

The Marshall theory, the theory of life and not of death, allows to the nation, that is, to the people as a whole, when once it finds a subject within the national cognizance, the widest and freest choice of methods for national control, and sustains every exercise of national power which has any reasonable relation to national objects. The negation of this theory means, for instance, that the nation—that we, the ninety million people of this country—will be left helpless to control the huge corporations which now domineer in our industrial life, and that they will have the authority of the courts to work their desires unchecked, and such a decision would in the end be as disastrous for them as for us.

If the theory of the Marshall school prevails, then an immense field of national power, now unused, will be developed, which will be adequate for dealing with many, if not all, of the economic problems which vex us; and we shall be saved from the ominous threat of a constant oscillation between economic tyranny and economic chaos. Our industrial and therefore our social future as a nation depends upon settling aright this urgent question.

The Constitution is unchanged and unchangeable save by amendment in due form. But the conditions to which it is to be applied have undergone a change which is almost a transformation, with the result that many subjects formerly under the control of the states have come under the control of the nation.

A hundred years ago there was, except the commerce which crawled along our seacoast or up and down our interior waterways, practically no interstate commerce. Now, by the railroad, the mails, the telegraph, and the telephone an immense part of our commerce is interstate. By the transformation it has escaped from the power of the state and come under the power of the nation. There-

fore there has been a great practical change in the exercise of the national power, under the acts of Congress, over interstate commerce; while on the other hand there has been no noticeable change in the exercise of the national power "to regulate commerce with foreign nations and with the Indian tribes."

I believe that the nation has the whole governmental power over interstate commerce and the widest discretion in dealing with the subject; of course under the express limits prescribed in the Constitution for the exercises of all powers, such for instance as the condition that "due process of law" shall not be denied. The nation has no direct power over purely intrastate commerce even where it is conducted by the same agencies which conduct interstate commerce.

The courts must determine what is national and what is state commerce. The same reasoning which sustained the power of Congress to incorporate the United States bank tends to sustain the power to incorporate an interstate railroad or any other corporation conducting an interstate business.

There are difficulties arising from our dual form of government. If they prove to be insuperable, resort must be had to the power of amendment. Let us try to meet them by an exercise of all the powers of the national government which in the Marshall spirit of broad interpretation can be found in the Constitution as it is. They are of vast extent.

The chief economic question of the day in this country is to provide a sovereign for the great corporations engaged in interstate business; that is, for the railroads and the interstate industrial corporations.

At the moment our prime concern is with the railroads. When railroads were first built they were purely local in character. Their boundaries were not coextensive even with the boundaries of one state. They usually covered but two or three counties. All this has now

changed. At present five great systems embody nearly four-fifths of the total mileage of the country. All the most important railroads are no longer state roads, but instruments of interstate commerce. Probably 85 per cent of their business is interstate business.

It is the nation alone which can with wisdom, justice and effectiveness exercise over these interstate railroads the thorough and complete supervision which should be exercised. One of the chief, and probably the chief, of the domestic causes for the adoption of the Constitution was the need to confer upon the nation exclusive control over interstate commerce.

But this grant of power is worthless unless it is held to confer thorough-going and complete control over practically the sole instrumentalities of interstate commerce—the interstate railroads.

The railroads themselves have been exceedingly shortsighted in the rancorous bitterness which they have shown against the resumption by the nation of this long neglected power. Great capitalists, who pride themselves upon their extreme conservatism, often believe they are acting in the interests of property when following a course so shortsighted as to be really an assault upon property. They have shown extreme unwisdom in their violent opposition to the assumption of complete control over the railroads by the Federal government.

The American people will not tolerate the happy-go-lucky system of no control over the great interstate railroads, with the insolent and manifold abuses which have so generally accompanied it. The control must exist somewhere and unless it is by thoroughgoing and radical law placed upon the statute books of the nation it will be exercised in ever-increasing measure by the several states. The same considerations which made the founders of the Constitution deem it imperative that the nation should have complete control of interstate commerce apply with peculiar force to the control of interstate



railroads at the present day, and the arguments of Madison of Virginia, Pinckney of South Carolina, and Hamilton and Jay of New York in their essence apply now as they applied one hundred and twenty years ago.

The national convention which framed the Constitution, and in which almost all the most eminent of the first generation of American statesmen sat, embodied the theory of the instrument in a resolution to the effect that the national government should have power in cases where the separate states were incompetent to act with full efficiency, and where the harmony of the United States would be interrupted by the exercise of such individual legislation.

The interstate railroad situation is exactly a case in point. There will, of course, be local matters affecting railroads which can best be dealt with by local authority, but as national commercial agents the big interstate railroads ought to be completely subject to national authority. Only thus can we secure their complete subjection to and control by a single sovereign, representing the whole people and capable both of protecting the public and of seeing that the railroads neither inflict nor endure injustice.

Personally I firmly believe that there should be national legislation to control all industrial corporations doing an interstate business, including the control of the output of their securities, but as to these the necessity for Federal control is less urgent and immediate than is the case with the railroads. Many of the abuses connected with these corporations will probably tend to disappear now that the government—the public—is gradually getting the upper hand as regards putting a stop to the rebates and special privileges which some of these corporations have enjoyed at the hands of the common carriers. But ultimately it will be found that the complete remedy for these abuses lies in direct and affirmative action by the national government.

I am not pleading for an extension of constitutional power. I am pleading that the constitutional power which already exists shall be applied to new conditions which did not exist when the Constitution went into being. I ask that the national powers already conferred upon the national government by the Constitution shall be so used as to bring national commerce and industry effectively under the authority of the Federal government and thereby avert industrial chaos.

My plea is not to bring about a condition of centralization. It is that the government shall recognize a condition of centralization in a field where it already exists. When the national banking law was passed it represented in reality not centralization, but recognition of the fact that the country had so far advanced that the currency was already a matter of national concern and must be dealt with by the central authority at Washington. So it is with interstate industrialism, and especially with the matter of interstate railroad operation today.

Centralization has already taken place in the world of commerce and industry. All I ask is that the national government look this fact in the face, accept it as a fact, and fit itself accordingly for a policy of supervision and control over this centralized commerce and industry.

## THE NATION AND THE CONSTITUTION<sup>1</sup>

Of late we have heard quoted again and again, from the bench and from the platform, the language of Chief Justice Taney in the Dred Scott case, that the Constitution "Speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers." The only objection to that fine phrase is that it is not true. The exact

<sup>1</sup> By Judge Charles F. Amidon. An address before the American Bar Association, in 1907. Report of the Thirtieth Annual Meeting of the American Bar Association, p. 463-85.

contrary would be nearer the truth, viz: That not a single distinctive word or phrase in the Constitution has the same meaning today which it had when that instrument came from the hands of its framers. Such language is as reprehensible from that side of the controversy as on the other side are the words of the impassioned phrase-maker referred to by Senator Knox in his very able address at Yale. With a practical and rapidly progressive people like ours, the pharisaical doctrine that the nation exists for the Constitution instead of the Constitution for the nation, can never obtain permanent acceptance. The Constitution performs its chief service when it holds the nation back from hasty and passionate action, and compels it to investigate, consider and weigh until it is made sure that the proposed action does not embody the passion of the hour, but the settled purpose of the years. A changeless constitution becomes the protector not only of vested rights but of vested wrongs. As Bacon says, "He that will not apply new remedies must accept new evils, for time is the greatest innovator. . . . A forward retention of custom is as turbulent a thing as any innovation." A constitution which fixedly restrains a people from correcting their actual evils becomes associated in the popular mind with the evils themselves. When it performs that rôle, as ours once did, it becomes in the estimation of reformers a "compact with hell," and enlightened statesmen appeal from its provisions to a "higher law."

But it is now insisted with a zeal such as has not been heard since John Taylor of Caroline, that if the Constitution is to be changed it must be done in the manner which the instrument itself provides for its amendment. To say that, however, is to say that it shall not be changed at all, for we are taught by a century of our history that the Constitution can no longer be thus amended. Since 1804 more than two thousand amendments have been proposed. Many of them have been the

subject of much public discussion, have found a place in party platform; some have received the requisite vote of one branch of Congress; but with the exception of the war amendments, all have failed of adoption.

The first twelve amendments may be regarded as merely formal, or as the result of the forces which produced the instrument itself. It required the fierce passions aroused by the Civil War to bring about the only direct amendment of the Constitution which has occurred apart from the period of its adoption. Even these amendments could not have secured the requisite number of states had it not been for the coercion of military power and political influence such as every lover of our country will hope can never be again employed for such a purpose. This, however, was not the worst feature of those amendments. The fierce passion necessary to secure their adoption was embodied in the amendments themselves. As a result they have been nullified in some of their most important provisions, and as to other features found in the Fourteenth Amendment, the Supreme Court in order to prevent their confounding our whole system of national and local government, was compelled in the slaughter house cases to resort to a construction which did violence to the language of the amendment, and defeated the avowed purpose of the men who employed that language. The most impressive lesson taught by the war amendments is that the Constitution cannot be amended in the manner which it provides except as the result of passions which wholly disqualify the nation for the work of constitutional amendment.

The vast enlargement of our country has made the method of amendment provided by the fathers far more difficult than they contemplated at the time. They also believed that they had forever foreclosed the possibility of government by party, and the inauguration of that system has made the plan which they devised unworkable; for any amendment which is proposed by one party

encounters the opposition of the other. If objection does not exist to the subject-matter, it is called forth by partisan considerations. No amendment, therefore, is possible except when one party controls the legislatures of three-fourths of the states, and a two-thirds majority in Congress. This condition has not existed since the early part of the last century, nor is it ever likely to occur again.

But probably the greatest force opposed to constitutional amendment is the fear of radicalism by the large business interests of the country. The wave of socialistic tendency, which is now sweeping over all western nations has greatly added to this alarm. Property knows that it is safe under the Constitution as it is. There is a very general understanding that formal amendment is impossible. Every year that goes by without such a change strengthens that understanding; but if its power were once broken by an actual amendment, it is impossible to foresee the forces that might be set in operation. Hence with business interests it is the fact of amendment that controls, and not the subject-matter.

It is not only true that the Constitution cannot be amended in the method which it provides, but that such a change is neither needed nor best. Formal amendment is not suitable to bring about those slight but steady modifications of fundamental law which adapt it to the progressive life of the nation. It is far too violent a remedy for that purpose. The Constitution has been and ought to be accommodated to the ever-changing conditions of society by a process as gradual as the changes themselves. Like the Kingdom of Heaven amendments such as these come not by observation. No political prophet can say of them, Lo, here! or Lo, there! As the result of more than a hundred years of experience the nation has become acquainted with this process of amendment and is satisfied with it. It must now be

accepted as a part of our frame of government of equal validity with the Constitution itself.

But if the Constitution is changed by interpretation will it not be entirely swept away by the process? We hear much of this argument *in terrorem*. In the minds of its advocates the Constitution is a kind of St. Rupert's drop, so fragile that if its elements be disturbed in the slightest degree, the entire combination will explode. Experience tells us that it is made of sterner stuff. After a century of such interpretation by which the instrument has been so altered that Mr. Ford tells us its authors would not know it, it is today performing its functions with far greater vigor than during the period following its adoption. Being a great instrument of government it cannot be read in the library. As the late Justice Miller stated to a company of judges and lawyers at St. Paul a short time before his death: "The great questions of constitutional law are not to be finally settled by nine men, however wise, taking them off into a room and reading and studying about them. That is the way we start the process. We place the decision the best we can, according to that light, and then see how it works in its actual application to the national life. Very frequently that illumination shows us that we have gone far to one side of the true line. With this instruction of experience we place the next case on the other side and observe its application and so on, from time to time adding to our thought and study the results of experience and observation, we finally evolve the true solution by a process of exclusion and inclusion. The meaning of the Constitution is to be sought as much in the national life as in the dictionary."

In our constitutional theory we habitually assume that the provisions of the Constitution have but one meaning, and that plain and precise. But this is not its real character. As Marshall declares in *McCulloch vs. Maryland*, "Its nature requires that only its great out-



lines should be marked, and its important objects designated. . . . It was intended to endure for ages to come, and to be adapted to the various *crises* in human affairs." An instrument of such a character must necessarily leave a wide latitude for construction. The fact that the Supreme Court in constitutional cases so frequently stand five to four, each division assigning weighty reasons for diametrically opposite views, shows plainly how much the Constitution in actual application is a matter of interpretation. Now that questions of government are becoming so largely economic, the majority of our so-called constitutional cases turn not upon the interpretation of the instrument itself, but upon the construction of the living conditions to which it is to be applied. Let me illustrate: A statute of New York provided that women should not be employed in manufacturing establishments between the hours of nine o'clock at night and six o'clock in the morning. In a recent decision of the Court of Appeals of that state, this law is declared unconstitutional upon the ground that there is nothing in the nature and duties of woman which justify the legislature in discriminating as to her employment. The gist of this decision is not the meaning of the Constitution, but the effect of labor in a manufacturing establishment upon the health of woman and her ability to perform the primary duties of home and motherhood; and while none of us would question the ability of the court to interpret the Constitution wisely, some at least would feel that in that case it fell into grievous error in its interpretation of life. Constitutional cases are in the same manner frequently decided not upon the language of the Constitution, but upon conflicting notions of life in which the courts assert doctrines at variance with both popular and legislative judgment. The danger of this practise is obvious. It gives us a government out of a law library, which, as Napoleon said, is the worst of all forms of government.



Courts are very fond of declaring that in the field of constitutional law they never exercise political power, but simply declare the private rights of parties. This is true as to the form but untrue as to the result. The ultimate effect of every constitutional decision is not only to declare the rights of the litigants, but to define the powers of government. If the Constitution were precise, and capable of but one construction, then the courts in construing it would be simply declaring the rule and in no way making it. But in the case of the Federal Constitution in particular, its provisions are so general as to leave a wide latitude for judicial construction; and within the scope of that latitude the court in construing the Constitution is exercising a political power second only to that of the convention that framed the instrument.

In the attempt to catch our Constitution in a statement, we have been frequently told of late that "the powers of the Federal government remain the same"; that the only change which has been wrought in our progressive history is the change of conditions to which those powers are applied. We would all agree, I think, that the powers of the Federal government remain the same in number; but can any candid lawyer say they remain the same in extent? It is quite true that "no independent and unmentioned power" can rightfully be added to the Federal government. But even such accurate statements cannot settle constitutional questions. When the instrument comes to be applied to a given case the question will still be open, Is the power which has been attempted an independent power, or is it so related to one of the great powers of the Constitution as to be an appropriate means for its execution? That question presents the old puzzle of the criterion of classification which Austin taught us was the most difficult problem of law, and which Madison pointed out in the *Federalist* to be as impossible of definite solution in the case of the

Constitution as it has been in natural history. What to Marshall was an appropriate means for collecting and disbursing the public revenue, was to Jefferson and his school the exercise of an independent power. It is because the Constitution is thus general that it has been possible to adapt it to changing conditions, and make it the beneficent organ of a progressive nation.

What is needed today is not that the Constitution shall be construed to mean precisely what it meant to Marshall or to Miller, Field, and Bradley, but that it shall be applied to present conditions by the same method and in the same spirit wherewith they applied it to the conditions of their times. In the performance of this, their highest duty, the Federal courts are no part of the administration. They will not answer to its needs or its criticism. But they are a part of the nation, and in the past have responded, and ought always to respond to the deep, abiding organic changes in the national life.

There never was a time when the interpretation of the Constitution required a more careful consideration of living conditions than today. Within the last fifty years economic forces have been introduced into our life that are as revolutionary of preexisting conditions as the introduction of gun-powder was of the state of feudalism. Seward's statement in the debate of 1850 that "Commerce is the god of boundaries and no man now living can tell its ultimate decree" is far more true at present than when it was uttered. When the Constitution was adopted the unit of our social and business life was the commonwealth. With the exception of the foreign and coasting trade, the commerce and industry of each state was confined to its own borders. The union was political instead of industrial or commercial. Today our industry and our commerce are national. They are made aware of state lines only by conflicting and often narrowly selfish enactments. The units of commercial and industrial organization extend to many states, often to the entire

nation. Instead of being required to obey one master, business is compelled to obey many. Coincident with this enlargement of business enterprise to embrace different states, has occurred a revolution in state activity. During the first half of the nineteenth century the doctrine of *laissez-faire* was the fundamental principle of government. The state left commerce and industry to private control. Today that is all changed. Government is now present in all lines of business. When the state regulated but little, business was not much concerned who did the regulating. But now that all governments are competing in their zeal for regulation, whether one government or many, the nation or the states, shall do the regulating, becomes a matter of paramount importance. These changed conditions in our actual life compel a reconsideration of our divided governmental authority to see what now belongs to the nation, and what to the states. The problem is not the same as it was; it cannot be answered by reading history or studying precedents.

The new condition has manifested itself most conspicuously in two fields, the railroad and the interstate industrial corporation. At the beginning the railroads were local. There was a time when in making a shipment of freight from New York to Buffalo, at least three different bills of lading were required. Now five great systems embody more than three-fourths of the total mileage of the country, and the work of consolidation is still in progress. There are no longer state roads, but all are instruments of interstate commerce. Actual statistics are wanting, but persons in a position to know are of the opinion that the local business of the railroads does not exceed 15 per cent of their entire traffic. In a case tried in one of our western states a few years ago, it was judicially found that the local business there involved amounted to less than 3 per cent. In the face of these conditions, it is impossible to maintain over com-

mon carriers the manifold control of the different states and the Federal government.

There is no way in which local business can be separated from through business. The same roadbed serves both; both are carried in the same train and by the same crew. Back of every schedule of rates prescribed by government is the question, Are those rates reasonably compensatory? Under our present system that question as to state rates must be decided solely upon local business, and as to interstate rates solely upon interstate business. The court cannot look to the entire traffic in judging of the reasonableness of either. While it is possible to ascertain what revenue is derived from each class, it is absolutely impossible thus to distribute the cost of operation and maintenance. The evidence upon that subject is wholly speculative and conjectural, consisting entirely of opinion testimony given by parties having a vital interest in the result of the litigation. In actual operation the railroads do not, and cannot keep the two kinds of commerce separate. Why then should the law attempt to divide that which in actual life is a unit and indivisible?

Whenever a state prescribes a schedule of rates for local business, it thereby directly and necessarily regulates interstate business as well. There can be no sudden lifts and falls at state lines. They have no relation whatever to the cost of service, and can afford no justification for discrimination in rates. As the result of the schedule of rates prescribed by the state of Minnesota during the past winter, the rates on the western side of an invisible line were from 25 per cent higher than those on the eastern side. The railroads could not maintain both these rates without discriminating against North Dakota points in a manner which would constitute a gross violation of that portion of the interstate commerce act which forbids discrimination against any locality. The necessary result of the enforcement of the local rates

was to compel a reduction of all through rates. This the Supreme Court has decided is such a direct interference with interstate commerce as to render the action of the state void. But further, if one state may prescribe a schedule of rates all states may, and the inevitable result of such a practice is to place the whole body of interstate commerce under the actual domination of state laws. In that way the authority which extends to only 15 per cent of the business, regulates the entire business. The necessary consequence is that either the nation must take control of railroad transportation within the states or the states will take control of such transportation among the states. We deceive ourselves by a mere form of words when we speak of the separate regulation of local business by the state and through business by the nation. The state cannot formulate and enforce any schedule of rates which will not necessarily and directly regulate interstate rates; neither can the nation formulate and enforce any schedule of interstate rates which will not necessarily and directly change local rates. The truth is that governmental regulation of rates is not a regulation of commerce, but of the railroads as an instrument of commerce, and when the nation and the state both prescribe to a railroad a schedule of rates, they are both regulating the same thing. This gives rise to a conflict of authority which Marshall declared in *Gibbons vs. Ogden* ought never to be permitted to occur.

The chief domestic cause for the adoption of the Constitution was to destroy the power of states over interstate commerce. But does not their control of railroads reestablish that authority, To say that states shall not regulate commerce among the states, and at the same time concede to them power to regulate the only instrumentalities by which that commerce is carried on, is to establish in practice what we deny in theory. Hitherto state regulation has been inefficient and for that reason alone its localizing power has not become manifest. But

now, through the investigations of economists and commissions, the general campaign of publicity, experience in rate litigation, the decreased influence of railroads over legislative bodies, there has come a new era in governmental regulation of carriers. State authority is becoming organized, energetic and effective. If continued it will work its inevitable results. In Commerce, as in politics, state governments will represent state interests. No rivalry can surpass that of our commercial centers, and the states in which they are located, let their power over carriers become effective, will exercise that power in support of their own cities. This is not theory. Only recently the commission of one of our most aggressive western states warned the railroads by a written communication that if they were not more considerate of the state as to interstate rates, the commission would retaliate by the exercise of its powers over local affairs. Other commissions, while not thus frank in their avowals, have been equally local in their practices. The severest critic of railroads cannot deny that their policy has been splendidly national, and the most potent single factor in the creation of our vast domestic commerce. In thus maintaining the commercial supremacy of the nation, they have been compelled to withstand the importunities and fierce wrath of local interests. Now, however, the conflict is to be transferred from this field of economics to the field of government. Localism is to speak not by petition but by statute. Under the régime as governmental control increases in efficiency, the irrepressible conflict between local and national interests will increase in directness as well as in the frequency of its exhibition and the intensity of the passions aroused. It has already brought us to the verge of civil war in North Carolina, and been the occasion of the sharpest acrimony in other states. Such a conflict must in the end result in the complete supremacy of one authority or the other.

It is vain to appeal to states, as did Secretary Root in



his New York address, to subordinate local advantage to the general welfare. Our whole history is a confirmation of the statement of Mr. Pinckney in the Constitutional Convention that "States pursue their interests with less scruple than individuals." They exhibit all that lack of conscience characteristic of those who exercise delegated power. As Justice Miller points out in his lectures on the Constitution, had it not been for the dominant authority of the central government, the general welfare would have been as completely sacrificed to local selfishness under the Constitution as it was under the Articles of Confederation. What states require is not exhortation but authority.

The situation in the field of industry presents the same general features. To abolish local control over matters extending outside of the state was the origin not only of the article conferring power on the national government to regulate commerce among the states, but also of those provisions which forbid states to lay imposts or duties on exports or imports, and which secure to the citizens of each state the privileges and immunities of citizens of the several states. These restrictions were placed in the Constitution not so much that men might be free, as that national commerce and industry might be free. They have been largely nullified in actual life by the fact that business is now carried on by corporations instead of persons. When the Constitution was adopted only twenty-one corporations had been formed in the United States. These were mainly for the construction of canals and turnpikes. There was but one bank and two trading companies. As business agencies corporations had no part either in life or thought, consequently they had no place in the Constitution. The Supreme Court has held that they are not citizens within the meaning of the Fifth Amendment, and that each state may either wholly exclude them, or impose as conditions of their entering or remaining in the state such terms as



local policy or interest may suggest. The result is that business which was intended to be free, has in fact become subject to local authority. The abuses of corporate organization and management have heretofore commended this exercise of local control. Ultimately, however, we shall become increasingly aware of its injustice and folly. Business cannot be conducted in this century except through the agency of corporations; but the very enlargement of that agency has caused industry, the same as commerce, to overleap the bounds of states, and thus become subject to governments whose only interest in them is that of the publican. "Federal," "National," "Union," "United States," "International," "American," these terms find a place in the names of the corporations that are carrying on our large business enterprises and are not mere high-sounding titles, but are truly indicative of the scope of the business conducted. They have taken national titles because their business is national and international. While engaged in the preparation of this paper I employed three young men in different libraries to examine and summarize state laws passed since 1890, directed against foreign corporations solely upon the ground of their alienage. My purpose was to institute a comparison between laws of that character now in force, and discriminatory statutes passed by the several states under the Articles of Confederation. But the mass of material turned in by these investigators was so great as to surpass any leisure at my command for its study and classification. The reports, however, leave no room for doubt that the laws now in force are both more vicious in character and varied in form than were those of the earlier period. At that time discrimination was confined in the main to taxation by states having ports of entry against those who had them not. Today they embrace not only double, and frequently manifold taxation, but the thousand forms of regulation which recent governmental activity in the field of business has developed.

A condition which was then deemed sufficient to cause the framing and adoption of the Constitution ought now to be adequate to compel the exercise of the power which the Constitution vested in the Federal government for the very purpose of controlling such conditions.

How far may the national government go in the control of those matters which have become in fact national? The situation fits exactly the terms of the resolution passed in the convention that framed the Constitution, and which was the source of all the powers and restrictions embodied in that instrument. It presents a case "to which the separate states are incompetent and in which the harmony of the United States may be interrupted by the exercise of individual legislation." As to railroads there is no more reason why they should be subject to a divided authority than there is in the case of navigation. There will, of course, be in the one case as in the other, local matters that can be best dealt with by local authority. But as to all that affects them as commercial agencies, whether that commerce be local or interstate, the railroad is a unit; its activities are national, and it ought to be subject solely to national authority. Divided control is inefficient in protecting the public, and grossly unjust in the burdens which it places upon the carrier. During the last winter there were passed in the states west of the Mississippi River one hundred and seventy-eight statutes dealing directly with transportation and its instrumentalities. The number of such statutes now in force throughout the entire country extends well into the thousands. They are conflicting, oppressive, inefficient. They seldom represent intelligent investigation, but in the main have had their origin in agitation, often in popular frenzy. State legislatures have not yet learned that due process of legislation, like due process of law, proceeds upon inquiry, and legislates only after hearing. Protection to the public and justice to the carrier alike unite in the demand for a single governmental

control. The power under the commerce clause of the Constitution is plain. The decisions of the Supreme Court have placed that subject beyond the realm of controversy. If the railroad as an instrument of commerce can only be dealt with justly and efficiently by a single authority the Federal government may assert and maintain its exclusive jurisdiction. Regulation is now inefficient because divided. If the Federal government shall take exclusive control, it will then be responsible alone for such a control as shall be both efficient and just. Public opinion will have a single point for its direction, and will not be dissipated among many conflicting authorities. The subject does not demand separate rules for the separate states. Their action refutes such a doctrine. By the legislation of the past winter Virginia and Ohio, Pennsylvania and Minnesota are combined in the same passenger rate, though they vary as five to one, in density of population and travel. The subject is national, and the Federal government with its national outlook can by organized investigation and accumulated experience best acquire the skill and knowledge necessary for its just and efficient regulation.

As to interstate industrial corporations, the subject is of much more recent development and the necessity for Federal control is less urgent. It may well happen that many of the abuses in this field will disappear with the abolition of rebates and the other special privileges which such corporations have enjoyed at the hands of carriers. The evil arising from hostile state enactments may be remedied by a change of emphasis on this subject in the decisions of the Supreme Court. Heretofore that tribunal has been governed in such cases solely by a consideration of the nature of the corporate being. But the present tendency in corporate law is to look at rights rather than the nature of the being possessing them, and if the court shall adopt that view, it may yet hold that alienage alone is not a proper basis for discriminatory

legislation; that legislation based solely upon that ground constitutes a denial of the equal protection of the laws. The late case of *American Smelting Co. vs. Colorado* affords encouragement to expect such a change.

If, however, Federal control shall be found necessary to correct the evils and protect the rights of interstate industrial corporations, authority for its exercise exists in the commerce clause of the Constitution as already interpreted. It has been decided by the highest court that "The power to regulate commerce among the several states is vested in Congress as absolutely as it would be in a single government having in its constitution the same restrictions as are found in the Constitution of the United States." That court has also held that as a means of executing this authority Congress may create corporations for the purpose of carrying on interstate commerce. One branch of that commerce is traffic or exchange among the several states, and if national corporations may be created for the purpose of carrying on that branch of interstate commerce which consists of transportation, as was done in the case of the Pacific Railroads the same method may be adopted as to the other branch of interstate commerce which consists of traffic and exchange. Can a corporation created for this purpose be also authorized to produce the articles in which it deals? In thought, manufacture and commerce may be separated, but in business the former is always combined with the latter. No one ever manufactured except for the purpose of sale. Under the present régime of wide markets, large sales, and small profits, commerce has become the paramount feature even of manufacturing enterprises. The incidental powers which Congress may confer upon a corporation created for Federal purposes were clearly defined in the litigation arising out of the *United States banks*. There the Federal feature was the collecting and disbursing of the national revenue. But to accomplish this result a cor-

poration was created, authorized to do a general banking business and to establish branches for that purpose in the several states. Of the actual business transacted, the Federal feature, though of capital importance to the nation, was a subordinate function of the corporation as a business concern. The opposition of the states was largely grounded upon this consideration. It was denied that they were agents. A resolution by the legislature of Ohio put the matter plainly: "We resist the shaving shops of a club of foreigners located among us without our consent." But the power of the Federal government to create the bank and to exempt it from all local authority as to its entire business was vindicated in the fullest measure. Under the national bank act this authority has been carried much further. Usury and its consequences have been defined and all state criminal statutes affecting the transactions of these banks, or their agents or officers, have been held null and void. Now apply these well-established doctrines to corporations created for the purpose of carrying on that branch of interstate commerce which consists of traffic and exchange. Would they not fully sustain the authority of Congress to confer upon such corporations manufacturing as well as commercial powers? Would not the commercial activities of such a corporation which confessedly fall within the scope of the commerce clause of the Constitution greatly surpass in importance the functions of the United States bank which consisted in collecting and disbursing the public revenue? And if a bank created for that subordinate Federal function might be given the power of carrying on a general banking business, why could not a corporation created for the purpose of carrying on interstate commerce, which would be a capital feature of its business, be at the same time authorized to produce either in whole or in part the articles which it applied to that commerce? It is said that *carrying on* interstate commerce is not the exercise of a Federal power, as was the collec-

tion and disbursement of the public revenue, and that is conceded; but *regulating* interstate commerce is a Federal power, and a corporation created as a means of such regulation may be freed from all state action that will interfere with the purpose of its creation. Surely if Congress as a means of regulating interstate commerce may create corporations to carry it on, it may endow them with all such powers as are fairly conducive to their success as business concerns, judged by the usual activities of corporations engaged in such commerce.

Our great corporations are now national in their character, and national and international in the scope of their operations. To regulate their formation is one of the most direct and efficient means of regulating their activities. For forty-five states to create corporations and the national government to regulate their most important business cannot fail to result in inefficiency and conflict. Hitherto interests to be regulated have found advantages in the dual form of authority. It has enabled them to assert whenever either authority attempted their regulation that the power properly belonged to the other authority. We have now arrived at a state of knowledge and publicity which makes this kind of shuffling impossible. The nature of the subject to be regulated and not the shifting desires of the interests concerned must determine the place of authority.

Our first great conflict between the states and the nation was waged over the subject of banking and finance. No sooner were we started under the Constitution than the need of a national agency in that field was discovered. But the local jealousy of the states prevented its establishment for more than seventy-five years. During that period we were subject to all the injury and confusion of wild-cat banking under state authority. Banking and finance, however, were not more national at that time than commerce and industry have now become, and the same conflict is again presented in this new field. We



can get along with divided authority today on these subjects just as we got along with state bank notes. This nation can stand almost anything. But it is the duty of government in the exercise of its power to create conditions which are not simply tolerable, but those which are most conducive to the general welfare. A uniform authority in the field of interstate commerce and industry will be found as beneficent today as it was discovered to be in the field of finance and banking as the result of our first economic conflict. The problem of regulating these affairs has attained its present magnitude largely because the Federal government has neglected to exercise its constitutional power over the subject in the course of its development. Until the interstate commerce act was passed in 1887 the negative power of the courts was the only Federal control. Even by them till 1886 the states were sustained in their authority over interstate as well as domestic rates of carriers. The truth is that the national government has so long neglected its powers under the commerce clause of the Constitution that now, when it tardily takes up its duties, it is charged by the states with usurpation.

The political revolution of 1776 required the creation of a central political power because it gave rise to great political concerns that could not be provided for by the several states. Today as the result of an economic revolution quite as fundamental and far-reaching there are certain great business interests that have become national in their character and extent which cannot be left to conflicting state authority. It is as unwise to stand timidly shrinking from the exercise of economic control now as it would have been a century ago to hold back from the exercise of political power through the fears of these who dreaded an adequate national government. We ought to look squarely at the nature and extent of our commerce and industry. Are they national? Ought they to be regulated by one or by fifty different sovereignties?



If in their nature and extent they are national, and in justice to the public and the interests to be regulated ought to be subject to a single authority, then we ought not to hold back from the exercise of the necessary power simply because it would add to the activities of the Federal government. We cannot refrain from the exercise of necessary powers upon the ground that the Federal government cannot perform the work wisely and efficiently without confessing that that government is inadequate to perform the duties which the nature of things and the Constitution alike devolve upon it. If national industry and commerce ought not to be subject to the jealousies and local interests of the several states, there is no alternative but to devolve their regulation upon the Federal government. Between these two forms of regulation we must make our choice. The election is not between national regulation and some ideally perfect scheme; it lies between the single authority of the nation and the anarchy of the different states in combination with partial national control. The way, the duty and the power are plain. Unless domestic conditions such as in 1788 compelled the framing and adoption of the Constitution, shall be impotent to compel the exercise of those powers granted by it in order that things which are national in their nature and extent may be controlled by national authority, there must be such as extension, not of constitutional power, but of the exercise of national powers already conferred as shall bring national commerce and industry under the single authority of the Federal government.

One hundred years ago those who opposed the adoption of the Constitution made "consolidation" their cry of alarm. Today those who oppose the control by the national government of the business affairs that have become national raise the cry of "centralization." The one cry is as foolish as the other. On both occasions the opposition is guilty of that highest political folly which

consists in hanging to a theory regardless of changed conditions in life. Centralization has already taken place out there in the world of commerce and industry. The only question remaining is, shall the government take cognizance of the fact?

## STATE AND FEDERAL POWERS<sup>1</sup>

I do not, however, come here today to speak only of the past, and still less to appeal merely to state pride. We can show that the past is with us a living force only by the way in which we handle ourselves in the present, and each of us can best show his devotion to his own state by making evident his paramount devotion to that union which includes all the states. The study of the great deeds of the past is of chief avail in so far as it incites us to grapple resolutely and effectively with the problems of the present. We are not now menaced by foreign war. Our union is firmly established. But each generation has its special and serious difficulties; and we of this generation have to struggle with evils springing from the very material success of which we are so proud, from the very growth and prosperity of which, with justice, we boast. The extraordinary industrial changes of the last half century have produced a totally new set of conditions, under which new evils flourish; and for these new evils new remedies must be devised.

Some of these evils can be grappled with by private effort only; for we never can afford to forget that in the last analysis the chief factor in personal success, and indeed in national greatness, must be the sturdy, self-reliant character of the individual citizen. But many of these evils are of such a nature that no private effort can avail against them. These evils, therefore, must be grappled with by governmental action. In some cases this govern-

<sup>1</sup> From an address by President Roosevelt at Harrisburg, Pa. October 4, 1906.

mental action may be exercised by the several states individually. In yet others it has become increasingly evident that no efficient state action is possible, and that we need, thorough executive action, through legislation, and through judicial interpretation and construction of law, to increase the power of the Federal government.

If we fail thus to increase it, we show our impotence and leave ourselves at the mercy of those ingenious legal advisers of the holders of vast corporate wealth, who, in the performance of what they regard as their duty, and to serve the ends of their clients, invoke the law at one time for the confounding of their rivals, and at another time strive for the nullification of the law, in order that they themselves may be left free to work their unbridled will on these same rivals, or on those who labor for them, or on the general public. In the exercise of their profession and in the service of their clients these astute lawyers strive to prevent the passage of efficient laws and strive to secure judicial determinations of those that pass which shall emasculate them. They do not invoke the Constitution in order to compel the due observance of law alike by rich and poor, by great and small; on the contrary, they are ceaselessly on the watch to cry out that the Constitution is violated whenever any effort is made to invoke the aid of the national government, whether for the efficient regulation of railroads, for the efficient supervision of great corporations, or for efficiently securing obedience to such a law as the national eight-hour law and similar so-called "labor statutes."

The doctrine they preach would make the Constitution merely the shield of incompetence and the excuse for governmental paralysis; they treat it as a justification for refusing to attempt the remedy of evil, instead of as the source of vital power necessary for the existence of a mighty and ever-growing nation.

Strong nationalist though I am, and firm though my belief is that there must be a wide extension of the power

of the national government to deal with questions of this kind, I freely admit that as regards many matters of first-rate importance we must rely purely upon the states for the betterment of present conditions. The several states must do their duty or our citizenship can never be put on a proper plane. Therefore I most heartily congratulate the people of the state of Pennsylvania on what its legislature, upon what its government, has accomplished during the present year. It is a remarkable record of achievement.

Through your legislature you have abolished passes; you have placed the office of the Secretary of the Commonwealth and the Insurance Commissioner upon an honorable and honest basis of salary only by abolishing the free system; you have passed a law compelling the officers and employees of great cities to attend to the duties for which they are paid by all the taxpayers, and to refrain from using the power conferred by their offices to influence political campaigns; you have prohibited the solicitation or receiving of political assessments by city employees; you have by law protected the state treasury from depredation and conserved the public moneys for use only in the public interest; you have by law for the protection of the elective franchise made tampering with the ballot boxes and the casting of illegal votes so difficult as in all probability to be unprofitable; you have provided a primary election law which guarantees to the voters free expression in the selection of candidates for office; you have by law regulated and improved the civil service systems of your greatest cities; and finally, you have passed a law containing a provision which I most earnestly hope will in substance be embodied likewise in a law by the Congress at the coming session—a provision prohibiting the officers of any corporation from making a contribution of the money of that corporation to any candidate or any political com-

mittee for the payment of any election expenses whatever.

It is surely not too much to say that this body of substantive legislation marks an epoch in the history of the practical betterment of political conditions, not merely for your state, but for all our states. It do not recall any other state legislature which, in a similar length of time, has to its credit such a body of admirable legislation. Let me, however, most earnestly urge that your legislature continue this record of public service by enacting one or two additional laws. One subject which every good citizen should have at heart above almost all others is the matter of child labor. Everywhere the great growth of modern industrialism has been accompanied by abuses in connection with the employment of labor which have necessitated a complete change in the attitude of the state toward labor.

This is above all true in connection with the employment of child labor. In Pennsylvania you have made a beginning, but only a beginning, in proper legislation and administration on this subject; the law must if necessary be strengthened, and it must be rigorously enforced. The national government can do but little in the matter of child labor, though I earnestly hope that that little will be permitted to be done by Congress. The great bulk of the work, however, must be left to the state legislatures; and if our state legislatures would act as drastically and yet as wisely on the subject of child labor as Pennsylvania has acted within the present year as regards the subjects I have enumerated above, the gain would be literally incalculable; and one of the most vital needs of modern American life would at last be adequately met.

So much for the state. Now for the nation; and here I cannot do better than base my theory of governmental action upon the words and deeds of one of Pennsylvania's greatest sons, Justice James Wilson. Wilson's career has been singularly overlooked for many years, but

I believe that more and more it is now being adequately appreciated; and I congratulate your state upon the fact that Wilson's body is to be taken away from where it now rests and brought back to lie, as it should, in Pennsylvania soil. He was a signer of the Declaration of Independence. He was one of the men who saw that the Revolution, in which he had served as a soldier, would be utterly fruitless unless it was followed by a close and permanent union of the states; and in the Constitutional Convention, and in securing the adoption of the Constitution and expounding what it meant, he rendered services even greater than he rendered as a member of the Continental Congress, which declared our independence; for it was the success of the makers and preservers of the union which justified our independence.

He believed in the people with the faith of Abraham Lincoln; and coupled with his faith in the people he had what most of the men who in his generation believed the people did not have; that is, the courage to recognize the fact that faith in the people amounted to nothing unless the representatives of the people assembled together in the national government were given full and complete power to work on behalf of the people. He developed even before Marshall the doctrine (absolutely essential not merely to the efficiency but to the existence of the nation) that an inherent power rested in the nation, outside of the enumerated powers conferred upon it by the Constitution, in all cases where the object involved was beyond the power of the several states and was a power ordinarily exercised by sovereign nations.

In a remarkable letter in which he advocated setting forth in early and clear fashion the powers of the national government, he laid down the proposition that it should be made clear that there were neither vacancies nor interferences between the limits of state and national jurisdiction, and that both jurisdictions together composed only one uniform and comprehensive system of



government and laws; that is, whenever the states cannot act, because the need to be met is not one of merely a single locality, then the national government, representing all the people, should have complete power to act. It was in the spirit of Wilson that Washington, and Washington's lieutenant, Hamilton, acted; and it was in the same spirit that Marshall construed the law.

It is only by acting in this spirit that the national judges, legislators, and executives can give a satisfactory solution of the great question of the present day—the question of providing on behalf of the sovereign people the means which will enable the people in effective form to assert their sovereignty over the immense corporations of the day. Certain judicial decisions have done just what Wilson feared; they have, as a matter of fact, left vacancies, left blanks between the limits of possible state jurisdiction and the limits of actual national jurisdiction over the control of the great business corporations. It is the narrow construction of the powers of the national government which in our democracy has proved the chief means of limiting the national power to cut out abuses, and which is now the chief bulwark of those great moneyed interests which oppose and dread any attempt to place them under efficient governmental control.

Many legislative actions and many judicial decisions which I am confident time will show to have been erroneous and a damage to the country would have been avoided if our legislators and jurists had approached the matter of enacting and construing the laws of the land in the spirit of your great Pennsylvanian, Justice Wilson—in the spirit of Marshall and of Washington. Such decisions put us at a great disadvantage in the battle for industrial order as against the present industrial chaos. If we interpret the Constitution in narrow instead of broad fashion, if we forsake the principles of Washington, Marshall, Wilson, and Hamilton, we as a people will ren-



der ourselves impotent to deal with any abuses which may be committed by the men who have accumulated the enormous fortunes of today, and who use these fortunes in still vaster corporate form in business.

The legislative or judicial actions and decisions of which I complain, be it remembered, do not really leave to the states power to deal with corporate wealth in business. Actual experience has shown that the states are wholly powerless to deal with this subject; and any action or decision that deprives the nation of the power to deal with it, simply results in leaving the corporations absolutely free to work without any effective supervision whatever; and such a course is fraught with untold danger to the future of our whole system of government and, indeed, to our whole civilization.

All honest men must abhor and reprobate any effort to excite hostility to men of wealth as such. We should do all we can to encourage thrift and business energy, to put a premium upon the conduct of the man who honestly earns his livelihood and more than his livelihood and who honestly uses the money he has earned. But it is our clear duty to see, in the interest of the people, that there is adequate supervision and control over the business use of the swollen fortunes of today, and also wisely to determine the conditions upon which these fortunes are to be transmitted and the percentage that they shall pay to the government whose protecting arm alone enables them to exist. Only the nation can do this work. To relegate it to the states is a farce, and is simply another way of saying that it shall not be done at all.

Under a wise and farseeing interpretation of the interstate commerce clause of the Constitution, I maintain that the national government should have complete power to deal with all of this wealth which in any way goes into the commerce between the states—and practically all of it that is employed in the great corporations does thus go in. The national legislators should most

scrupulously avoid any demagogic legislation about the business use of this wealth, and should realize that it would be better to have no legislation couched either in a vindictive spirit of hatred toward men of wealth or else drawn with the recklessness of impracticable visionaries. But, on the other hand, it shall and must ultimately be understood that the United States government, on behalf of the people of the United States, has and is to exercise the power of supervision and control over the business use of this wealth—in the first place, over all the work of the common carriers of the nation, and in the next place over the work of all the great corporations which directly or indirectly do any interstate business whatever—and this includes almost all of the great corporations.

During the last few years the national government has taken very long strides in the direction of exercising and securing this adequate control over the great corporations, and it was under the leadership of one of the most honored public men in our country, one of Pennsylvania's most eminent sons—the present senator, and then Attorney General, Knox—that the new departure was begun. Events have moved fast during the last five years, and it is curious to look back at the extreme bitterness which not merely the spokesmen and representatives of organized wealth, but many most excellent conservative people then felt as to the action of Mr. Knox and of the administration.

Many of the greatest financiers of this country were certain that Mr. Knox's northern securities suit, if won, would plunge us into the worst panic we had ever seen. They denounced as incitement to anarchy, as an apology for socialism, that advocacy of policies that either have now become law or are in fair way of becoming law; and yet these same policies, so far from representing either anarchy or socialism, were in reality the antidotes to anarchy, the antidotes to socialism. To exercise a

constantly increasing and a constantly more efficient supervision and control over the great common carriers of the country prevents all necessity for seriously considering such a project as the government ownership of railroads—a policy which would be evil in its results from every standpoint.

A similar extension of the national power to oversee and secure correct behavior in the management of all great corporations engaged in interstate business will in similar fashion render far more stable the present system by doing away with those grave abuses which are not only evil in themselves but are also evil because they furnish an excuse for agitators to inflame well-meaning people against all forms of property, and to commit the country to schemes of wild, would-be remedy which would work infinitely more harm than the disease itself. The government ought not to conduct the business of the country; but it ought to regulate it so that it shall be conducted in the interest of the public.

Perhaps the best justification of the course which in the national government we have been pursuing in the past few years, and which we intend steadily and progressively to pursue in the future, is that it is condemned with almost equal rancor alike by the reactionaries—the Bourbons—on one side, and by the wild apostles of unrest on the other. The reactionary is bitterly angry because we have deprived him of that portion of his power which he misuses to the public hurt; the agitator is angered for various reasons, including among others the fact that by remedying the abuses we have deprived him of the fulcrum of real grievance, which alone renders the lever of irrational agitation formidable.

We have actually accomplished much. But we have not accomplished all, nor anything like all, that we feel must be accomplished. We shall not halt; we shall steadily follow the path we have marked out, executing the laws we have succeeded in putting upon the statute

books with absolute impartiality as between man and man, and unresting in our endeavor to strengthen and supplement these by further laws which shall enable us in more efficient and more summary fashion to achieve the ends we have in view.

During the last few years Congress has had to deal with such vitally important questions as providing for the building of the Panama Canal, inaugurating the vast system of national irrigation in the states of the great plains and the Rocky Mountains, providing for a Pacific cable, upbuilding the navy, and so forth. Yet in addition to these tasks, some of which are of stupendous importance, Congress has taken giant strides along the path of government regulation and control of corporations; the interstate commerce law has been made effective in radical and far-reaching fashion, rebates have been stopped, a pure food law has been passed, proper supervision of the meat packing business provided, and the Bureau of Corporations established—a bureau which has already done great good, and which can and should be given a constantly increasing functional power.

The work of legislation has been no more important than the work done by the Department of Justice in executing the laws, not only against corporations and individuals who have broken the anti-trust or interstate commerce law, but against those who have been engaged in land frauds. Scores of suits, civil and criminal, have been successfully undertaken against offenders of all kinds—many of them against the most formidable and wealthy combinations in the land; in some the combinations have been dissolved, in some heavy fines have been imposed, in several cases the chief offenders have been imprisoned.

It behooves us Americans to look ahead and plan out the right kind of a civilization, as that which we intend to develop from these wonderful new conditions of vast industrial growth. It must not be, it shall not be, the

civilization of a mere plutocracy, a banking-house, Wall Street-syndicate civilization; nor yet can there be submission to class hatred, to rancor, brutality, and mob violence, for that would mean the end of all civilization. Increased powers are susceptible of abuse as well as use; never before have the opportunities for selfishness been so great, nor the results of selfishness so appalling; for in communities where everything is organized on a merely selfish commercial basis, such selfishness, if unchecked, may transform the great forces of the new epoch into powers of destruction hitherto unequalled.

We need to check the forces of greed, to ensure just treatment alike of capital and of labor, and of the general public, to prevent any man, rich or poor, from doing or receiving wrong, whether this wrong be one of cunning or of violence. Much can be done by wise legislation and by resolute enforcement of the law. But still more must be done by steady training of the individual citizen, in conscience and character, until he grows to abhor corruption and greed and tyranny and brutality and to prize justice and fair dealing.

The men who are to do the work of the new epoch must be trained so as to have a sturdy self-respect, a power of sturdy insistence on their own rights, and with it a proud and generous recognition of their duties, a sense of honorable obligation to their fellows, which will bind them, as by bands of steel, to refrain in their daily work at home or in their business from doing aught to any man which cannot be blazoned under the noonday sun.

### NEW FIELDS FOR FEDERAL POWER<sup>1</sup>

"Before many years," said in effect a conservative member of Congress the other day, "there will not be left a department of human life over which the national

<sup>1</sup>From *The Nation*. 82: 131-2. February 15, 1909.

government does not somehow exercise control." Great as have been the extensions of Federal functions within a comparatively few years past, there are enough others in contemplation to draw from their graves the statesmen who were arguing against internal improvements three-quarters of a century ago. In the President's last annual message there were no less than eight specific recommendations involving the exercise of new functions, or the assumption of new tasks, by the Federal government. And if a list were compiled of the suggestions made along the same lines by bills now before Congress, or resolutions of public bodies—leaving out freak bills and constitutional amendments—it would probably be twice as long.

Railroad rate-making happens to be the most conspicuous proposal just at present. This is one of the things the national government is asked to do because, unless it undertakes the task, it will not be performed at all. The states could not secure the same results even if they all cooperated to the full. The same may be said, of course, regarding the proposed regulation of express companies and national supervision of insurance. Other measures, widely differing in subject-matter, fall into the same general class, because they propose that the government shall do something not done by anybody at present, or at least not done efficiently. Such, for instance, are the protection of Niagara Falls—in which the Federal power over boundaries may be invoked—the preservation of the Great Lake fisheries by international agreement, and Commissioner Sargent's much discussed scheme for deflecting the stream of immigrants to those sections of the country where they are wanted.

Next may be classed the proposals which are urged on the ground that the Federal government should step in merely to give the several states a chance to regulate their own affairs. These, for the most part, grow out of changed conditions. Centers of production and con-



sumption have come to be so far apart, transportation so easy, and traveling so incessant, that local regulations, once amply sufficient, have proved, in many lines, to be little better than farcical. The pure food bill owes much of its backing to the fact that a state with good food laws is now at the mercy of one with bad laws or none, which can flood it with impure products; the prohibition communities never cease asking for congressional action that will undo the "original package" decisions and help the state authorities to stop liquor in transit the moment it crosses the line. Other bills favored by the same interests wish a law that will make the records of the internal-revenue office more useful in the prosecution of illicit liquor-sellers. The national quarantine law, which, as always after the threat of an epidemic, is being strongly urged this year, would similarly save the neighboring states from the consequences of the laxity of any one. And President Roosevelt's recommendation, that the criminal process of each state be made to run throughout the entire country, bears somewhat the same relation to moral health.

Finally should be mentioned those instances in which national action is urged chiefly to secure uniformity of system in some department. The practical restriction of naturalization to the Federal courts, as recommended recently by a commission, is one example, and another the partly completed extension of national trade-mark legislation; while the national child labor law, strongly pushed by a state labor commissioner recently, though without citation of the constitutional provision which would authorize it, is a type of many benevolent measures so advocated. Though some of these have been actively opposed and some kept from passage for many years, the argument, on abstract principles, of danger from the assumption of additional functions by the Federal government is almost never heard. In fact, it is remarkable how much support such measures have in the



old region of jealous states rights sentiment. The national quarantine is distinctively a southern measure, the liquor shipment bills are most strongly advocated there, and as for pure food, two southern states are the only ones which, by a provision of their state law, have made the food standards of the Secretary of Agriculture go into effect within their borders as fast as promulgated. So a number of southern as well as northern states have voluntarily turned over their quarantine stations to the Public Health and Marine Hospital Service.

Efficiency has come to be the controlling argument in most of these cases. Our national government has a way of getting things done—not economically perhaps, but efficiently—that the states simply stand by and envy. The illicit liquor-seller, who defies the sheriff and the chief-of-police, would not dare to run for a week without paying his Federal tax. The Federal officer, in any line of work, is freer from hampering local influences and is apt to be backed up more firmly in doing his duty. The present advocacy of Federal control as a general panacea is really not so much an indication of changing constitutional views, as a tribute to the relatively effective way in which power is applied from Washington.

## THE NATION VERSUS STATES RIGHTS

What is the nation? It is the American people in the mass. And what are the states? They are the same American people split up into forty-six groups. So there can be no danger from the national government, except the danger that comes from the American people themselves acting in common; and, of course, the people are not going to injure themselves or their own interests.

But these same people, split up into forty-six smaller "sovereignties," are in danger; because powerful in-

<sup>1</sup> By Albert J. Beveridge. *Reader*. 9: 356-64. March, 1907.

terests which exploit the people and the nation's resources can more easily handle a smaller portion of the American people for their purposes than they can handle the entire eighty millions of the people for their purposes. And if they are defeated in one state—one small subdivision of the American people—they always have forty-five other chances.

### STATES RIGHTS FOR REVENUE

This analysis reveals the heart of the present battle against the people's instinctive effort toward national unity. Every corporation, so great that its business is nation-wide, is championing states rights. Every railroad that has felt the regulating hand of the nation's government is earnestly for states rights. Every trust attorney is declaiming about "the dangers of centralization." Do you know one who is not? Indeed, this present conflict largely grew out of the assertion of nationality in the rate bill and other acts which extended the control of the people's government over the railroads, and in the activity of the nation in investigating certain mammoth businesses. I do not say that all advocates of states rights are trust attorneys, but that all trust attorneys are advocates of states rights.

In what is said in this paper about the origin and motive power behind the present revival of states rights I do not include that great body of able and upright men who, on principle, sincerely oppose centralization. Of course, most believers in states rights are earnest, honest, patriotic, and at their head in talent, purity and courage stands Mr. Bryan. So when I describe the selfish money interests which now seek, as they have always sought, their own benefit behind states rights, I do not refer to those who adhere to that doctrine on principle.

Of course, this well-known position of these vast interests is entirely selfish. Every financial power looks

after its own welfare exclusively. If it meant money in the pockets of the railroads and trusts, does anybody doubt that they would be as eager to see the powers of the people's Congress increased, as they are to see the powers of the people's Congress diminished? And does anybody doubt that the real reason of these mighty financial interests for engineering this twentieth century crusade for states rights is that they believe that by curbing the power of the American people expressed through the people's Congress they can better "protect" their plans for financial gain?

#### CLEVELAND AND THE CHICAGO RIOTS

This illustration: In 1896 I was called upon to close the campaign for my party in Chicago, answering Governor Altgeld's Cooper Union speech in New York. He had with marked ability attacked President Cleveland for sending troops to Chicago in the riots of the preceding year, and charged us with indorsing that action. The Constitution forbids the President from sending national soldiers to a state to suppress disorder when neither the legislature nor the governor calls for them. Neither Governor Altgeld nor the Illinois legislature had called for troops, and so this ablest advocate of states rights since Calhoun denounced President Cleveland's action as a violation of the Constitution. We accepted the issue; and my speech was directed exclusively to the right of the President to send troops to a state, when both the governor and legislature were in league with the mob, and the mob was burning property and destroying life. This mob was not the railway workingmen or any real workingmen. It is only stating history to say that the Railway Managers' Association, by subjecting the railway employees to something like bondage, forced the employees themselves to organize into the American Railway Union, and thus made the strike itself at least

excusable. The original moral lawlessness was committed by the managers' association.

But it happened that it was the property of the railroad companies and other great corporations which had been destroyed. So the speech was instantly indorsed with hot enthusiasm by every railroad and great corporation in the country. The great financial interests were at that time all for "nationality"—all against "states rights." Yet when during the last five years the nation's Congress passed laws requiring that simple justice of these same interests which is required between man and man; and when President Roosevelt dared execute these laws, they immediately about-faced and are as much against "nationality" and for "states rights" now as they were against states rights and for nationality then.

The statesmanship of Theodore Roosevelt, which brings to another crisis this century-old conflict, is a natural continuation of the statesmanship of Washington, Jackson and Lincoln. None of them was an "autocrat," "tyrant," etc., though all were called so. Their statesmanship was only the sense and righteousness of the American people striving to act in common, although it was called "centralization" and "dangerous extention of national power." Then, precisely as it is now, none of them was a "destroyer of our liberty," though they were all bitterly assailed as such. Each was in his own period merely the master workman and the directing voice among the American millions working in the building of the nation.

#### EARLY LEGISLATION AND STATES RIGHTS

Perhaps the exact meaning of nationality and states rights can be best defined by reciting in more detail what each theory has meant in tangible laws and policies from the beginning until now. For example, it became neces-

sary in the opinion of Congress to charter a national bank. The purpose of this was to secure an easier transportation of the people's money from one part of the republic to another. States rights denied the existence of this power—and it seemed that states rights had the best of the argument, contending that the national government is one of “enumerated powers,” and that it has no power except such as is expressly “delegated” to it by the Constitution.

And the Constitution gave Congress *no power to charter a bank*. The Supreme Court, in an opinion which is almost as important as the Constitution itself, said that not all the powers of the national government were given in express terms; but that it has any and all powers which can be *implied* from those expressly granted. Therefore, said the Supreme Court, while the Constitution gives Congress no power to charter a bank, it does give it power to raise armies, equip navies, etc.; this requires money and its convenient transportation; a national bank is an appropriate instrument to accomplish this, and therefore the nation's Congress has, although not the express, yet the *implied* power to charter a bank. This was the beginning of the “usurpation of the rights of the states” and of “the dangerous tendency toward centralization.”

#### ALWAYS THE CRY OF CENTRALIZATION

Still another illustration of this “dangerous extension of Federal power.” When Madison was President, Congress passed a bill to construct national roads and canals, improve water courses and *make internal improvements*. The people needed land and water highways to communicate among themselves and to transport their products all over the country, and under the states rights theory they could not have these things, because if one state built them and another state did not, the roads and canals

which any state built were useless except within its own limits. So the people's Congress passed this act for the national roads, canals and "internal improvements."

President Madison vetoed this bill March 3, 1817, showing, with greatest possible clearness, that it was a "dangerous assertion of national power." He says that "seeing that such a power is not expressly given by the Constitution . . . *and cannot be deduced from any part of it except by an inadmissible latitude of construction,*" he vetoes the bill. All this looks grotesque to us today, does it not? For now every Congress passes a bill carrying scores of millions of dollars for dredging and deepening rivers and harbors and for other internal improvements. Yet states rights literally raged (it even became a political issue) against this first law for internal improvements as a ruinous tendency toward centralization and a flagrant usurpation of the rights of the state. Thus does time and the necessities of the American people answer the word-logic of verbal theorists.

A striking example of the "dangerous tendency toward centralization" and "usurpation of the rights of the states": Certain moral hyenas were sending obscene literature through the mails. They were poisoning the character of boys and girls who soon would be citizens. "The interests of the nation" demanded that it should be stopped. Some states passed laws to stop it; but those laws operated only within the state. Other states did not pass such laws. And if all the states passed good laws except one, still, through the channels of interstate commerce as well as through the postal service, these books and pamphlets could be sent elsewhere throughout the country; and no state could pass any law that would prevent it.

The Constitution gives Congress no express power to stop this ruinous commerce. On the contrary, the Constitution expressly guarantees "freedom of speech"; and,

of course, books, pamphlets, articles and anything printed is "speech" just as much as words actually uttered by the mouth are "speech." Nevertheless, the power of the nation had to be exercised. So Congress exercised it by excluding obscene literature from the mails. States rights resisted this law as a "dangerous extension of national power." The same old arguments that we hear today were made then about the "peril of centralization," etc. Publishers carried the case to the Supreme Court of the United States.

But the Supreme Court held that this power of the nation might be properly *implied* from the provisions of the Constitution giving Congress the power "to establish postoffices and post roads." Of course, excluding anything from the mails is not "establishing postoffices and post roads"—but that was the Supreme Court's method of asserting nationality.

#### INTERSTATE COMMERCE

But this evil business continued through express companies and railroads. *They* could not be reached by the "postoffices and post roads" clause of the Constitution. But Congress exercised the nation's power by *prohibiting* transportation of obscene literature *in interstate commerce*. The Constitution gives Congress power "to regulate commerce with foreign nations, among the several states and with the Indian tribes." States rights said that this was not "regulating" commerce, but "*prohibiting*" commerce; that if the nation could do this it could *prohibit* commerce altogether; and various other arguments just as foolish. States rights insisted that each state had the exclusive "right" to protect the morals of its people; and that this law was an "invasion" of this "right." Nevertheless nationality asserted itself in this law, which stands to this day and will always stand.

Still another example of what this conflict between



nationality and states rights means: Everybody remembers the great Louisiana lottery. Lottery tickets were sold everywhere. Again, the states were powerless to stop it, for the same reasons that they were powerless to stop obscene literature. Again, nothing but the nation itself was strong enough to end this evil. So, the nation's Congress passed a law prohibiting *interstate commerce* in lottery tickets. And states rights again beheld the "dangerous tendency toward centralization." The lottery and express companies which profited from this infamy carried this case to the Supreme Court of the United States. Perhaps no other case before or since has been more determinedly fought. States rights proved that if this power of nationality were conceded, we would soon be an empire. "If Congress can do this," said they, "there is nothing that Congress cannot do." But the Supreme Court, in one of the six greatest opinions ever delivered in the whole history of jurisprudence, declared that the power of the nation was equal to the emergency. It is curious now to read in the newspapers and magazines of that day the alarm over this "dangerous tendency toward centralization."

At its last session Congress passed a law putting quarantine in the hands of the nation. This had always been in the hands of the states. But a hundred years had shown that the states, acting separately, were not equal to keeping out yellow fever and other plagues. For example, if yellow fever were kept out of the ports of one state and got in through the ports of another state, it attacked the people living in both states. Yellow fever is no more conscious of state lines than you or I are conscious of state lines when we ride over them in a railroad train. Yellow fever does not stop at the boundaries of states any more than a telegraphic message does. Nothing but the power of the nation was great and broad enough to keep yellow fever and other pestilences out of the republic. And, although this assertion of na-

tionality was *admitted* to, be a direct infringement of the "rights of the states," its passage was only feebly resisted. For no great business interests were thriving on yellow fever; nobody was financially benefited by asserting states rights in excluding it. Again we see that the preservation of the rights of the states becomes a "sacred cause" *usually when nationality threatens unrighteous pocketbooks.*

### POISON DRUGS AND THE BEEF TRUST

Manufacturers were putting poison into the food and medicine of the people. This was good for the pockets of the manufacturers, but bad for the health of the people. The people needed protection. They could not protect themselves, because they could not inspect and analyze foods and drugs. As has been the case for a hundred years in everything else, the states *did not act*—could not act, indeed, for, as in the case of lottery tickets and obscene literature, if every state acted but one, and that one did not, prepared death in the form of food and medicine could be sent out to the millions from that single state.

It was clear that if the health of the people was to be preserved the nation must act. So the nation tried to act through the now historic law, known as the pure food bill. But it could not pass. The manufacturers resisted, and time and again killed it with the sword of states rights. They said that if food and medicine were to be inspected at all, it was the province of the states to do it. The nation had no "police power," said they—and, as yet, that is true. It was a direct, flagrant invasion by the nation of the "sacred rights of the states," said these getters of unholy wealth. It seemed that these poisoners of the American people, with the aid of states rights, would certainly prevail. "Great constitutional lawyers" had "serious doubts" about the "constitu-

tionality" of the proposed law. Other "great constitutional lawyers" were "profoundly convinced" that the nation had no such power as a matter of law and that the bill was a "dangerous tendency toward centralization" as a matter of policy.

It probably never would have passed but for the storm of wrath that swept over the republic at the revelations of the iniquity of the beef trust. Certain writers informed the American people that the meat which the beef trust had been selling them was diseased. The disgusting details are still fresh in everybody's mind. The moment this shocking revelation came, and while the beef trust was denouncing the stories as untrue, I began the preparation of a bill, which, excepting two points, is now the law, to stop the revolting and murderous practice of selling disease to the American people in the form of meat and meat food products. Everybody remembers that President Roosevelt sent a commission to examine the packing houses and find out whether the terrible tales told of them were true; and how their report aroused to fury the anger of the nation. Up to that time my bill had not the slightest chance of passing. It never would have passed but for President Roosevelt. Our meat law is one of the scores of blessings which the American people owe, exclusively, to the President.

For, again, "great constitutional lawyers" were convinced that the bill was "unconstitutional." Again, the "sacred rights of the states" were "invaded"; for the meat law sends the nation's agents into the packing houses themselves; and heretofore it has been conceded that the inspection of packing houses, like the inspection of any other factory, is the exclusive business of the state in which the packing house is located.

But when the hurricane of anger that followed the report of the President's commission swept over the land, these "states rights" objections suddenly ceased,

and the bill was passed. To be sure, the packers still resisted the bill, but their cause became too unpopular to keep aloft the banner of the "sacred rights of the states." And so this assertion of nationality—by far the greatest in our history—was not thus longer resisted. This law will not be repealed. And the beef trust has not yet dared to question its "constitutionality." If there is any sincerity in the present hue and cry about states rights, why is not the meat law attacked? for it is the most daring "invasion" of the "sacred rights of the states" ever made in American history.

The storm raised by the beef trust scandal caused the passage of the pure food bill; and states rights, though sorely wounded, made little outcry because it would have been most unpopular. You will observe that states rights is a very politic creature and seldom becomes excited for "liberty" *except when some financial interest is endangered by the assertion of nationality.* States rights is not often heard of, *unless financial interests are threatened;* and not even then, if the people happen to be sufficiently aroused against an evil which nationality will end.

#### CHILD LABOR AND OTHER EVILS

An example immediately at hand: Child slavery exists in the mining regions and in the silk mills of Pennsylvania, the cotton factories of the south, the glass works of New Jersey and West Virginia and, indeed, at numerous points throughout the whole republic. Scores of thousands of little children, from five to fourteen years of age, are compelled to work from ten to twelve hours a day to their physical, mental and moral ruin and the degeneracy of the race.

The states do not and cannot stop it. The interests that thrive on child murder are so powerful in the states where it is worst that they prevent the passage of

thorough laws, or, if passed, prevent their thorough execution. Nothing can end this national evil but a national law. So I introduced a bill in Congress to prohibit interstate railroads from carrying the products of factories and mines that are working little children to death.

It carefully avoids technical "states rights," for I wanted every vote of honest believers in that theory; otherwise, I would have made it as direct as the meat bill.

Yet it is resisted upon the grounds that such a law is beyond the power of the nation; that the states have exclusive control over industries within their own borders; that the states alone are the guardians of the health and morals of their citizens—(of course citizens of a state are also citizens of the republic; but that vital fact seems to make no difference). *Precisely the same argument in the same words was made in defense of lotteries and obscene literature.* In all three cases the interests whose infamies, nationality attacked, cloak-ing themselves with "states rights," insisted that the nation had no power to *prohibit* interstate commerce in these things; that this was an *indirect* way of reaching an evil which the nation could not reach *directly*; and which the states alone, acting separately, have the "right" to deal with.

Of course Congress has done this very thing, and *without question*, in numerous other cases; but in each of these cases, when Congress asserted this national power *without question*, no financial interests were injured. For example, Congress passed a law *prohibiting* railroads and express companies from carrying certain kinds of insects, such as the boll weevil and gypsy moth; and nobody objected—no great business interests were thriving on the boll weevil and gypsy moth.

But "states rights" did resist, determinedly, even to

the supreme court, the laws prohibiting interstate carriers from transporting obscene literature and lottery tickets. And now, behind the mask of "states rights," the interests profiting by child labor are frantic against the proposed law prohibiting interstate commerce in the products of child labor—this, too, although states rights is not technically touched by the bill.

It is significant that the *degree* of resistance in each of these three cases was measured exactly by the extent of financial interests involved. The resistance to the lottery ticket law was greater than the obscene literature law; and the financial interests concerned in lotteries were manifoldly greater than the financial interests concerned in obscene literature.

#### UNITED WE STAND

The determined fight against the child labor bill is a thousandfold greater than against either the obscene literature or the lottery laws; and the financial interests profiting from child labor are a thousandfold greater than the financial interests concerned in both the lottery tickets and obscene literature. I am not drawing any conclusion from the fact that "states rights" slumbers when no financial interests are involved and is aroused only when financial interests are involved; *I am merely stating the fact*. For a fact it is which no man can dispute.

So we see what "states rights" and nationality respectively have stood for during a century and a quarter, and what each stands for today. I have given these details so that no one can accuse me of "vagueness," which is a favorite word with the "states rights" doctrinaires. But these examples do more than that—they are themselves the unanswerable argument for nationality. They show the progress of the American people toward that national unity, by which alone the

American people can realize their destiny and best secure to themselves "life, liberty and the pursuit of happiness."

We are one people, speaking one language, living in one country, under one flag. What affects one of us affects all of us. Most of the evils that develop among us are common evils, to be reached only by a common remedy. Scarcely any evil is confined exclusively to one state. It is clear that where an evil is general, states acting separately cannot uniformly attack it; and it is a fact that in the case of every general evil the states, acting separately, *never have uniformly attacked it*. The American people alone, acting in common—that is acting as a nation—can destroy evils which affect them in common—that is, affect them as a nation. Proof of this is found in all the illustrations above and in scores of others equally strong.

So nationality means merely *the American people, acting in common* against evils which affect them in common. States rights mean merely these same American people divided into forty-six "sovereign" groups, and therefore acting not harmoniously and in common, but separately and therefore impotently. The extent to which the American people are divided precisely measures the extent to which their power to end abuses is diminished. It is all summed up in the republic's motto, "United we stand, divided we fall."

This does not mean destruction of the states in their natural spheres of action. And their natural spheres of action are described by the phrase "local self-government." The dividing line between the legitimate development of nationality and the proper exercise of honest "states rights" may be stated thus:

When an evil or a benefit is so widespread that it affects so much of the country as to be called national, the *nation's* power should be equal to end that evil or secure that benefit to the American people.



## CHANGED CONDITIONS

When an evil or a benefit is purely local and affects none of the American people except that part of them who live in the state where the evil exists or the benefit can be applied, and nowhere else, the *state* should end that evil or secure that benefit.

The progress of nationality and the decay of "states rights" grows out of changed conditions. The railroad, telegraph and telephone have bound our people into a national *unit*. None of these agencies of national solidarity existed when the republic was founded. We were then a handful of people, and this handful separated by lack of communication. But now San Francisco is much nearer New York than Pittsburg was to Boston in the old days. One can travel in luxury from Washington to Chicago in a fifth of the time that the fathers could cross the state of Pennsylvania. We can talk instantaneously from St. Louis to Philadelphia today. Whereas, we were only four million people in the days when states rights was in its greatest vigor, we are now eighty millions of people, and in half a century will be two hundred millions of people—and these all woven closely together by the most perfect facilities of communication the world has ever seen.

All this creates new problems which the old theory of states rights never contemplated, and new necessities on the part of the people which states rights cannot supply. But the people's problems must be solved, the people's necessities supplied. Each day makes it clearer that only the nation can do this. That is why the nation is doing it. If the states could do that work better, nothing could prevent them from doing it. It is because the nation is the only force equal to the daily developing needs of the people that nationality is developing, and for no other reason. In all of this there is no harm, but only the welfare of the people; for it is merely

the people themselves acting in common for their common good.

After all, the purpose of these free institutions of ours is to make better people. The reason of our government is to improve human conditions and to make this country a fairer place for men and women to live in. No jugglery with mere phrases can impair this mighty truth, upon which, and upon which alone, the republic is founded.

### REPLY TO MR. BRYAN<sup>1</sup>

#### FEDERAL ABSORPTION OF POWER

Mr. Bryan says that

A systematic absorption of power by the federal government would not only cause discontent and weaken the attachment of the people for the government, but a withdrawal of power from the state would breed indifference to public affairs—the forerunner of despotism.

“Despotism” from whom, Mr. Bryan? For the national government is *the American people*. Mr. Roosevelt is powerful only as he personifies the American people. Jackson was “despotic” only as he gathered into himself and then radiated again the will of the people. So was Washington. So was Lincoln, whose murderer exclaimed, “*Sic semper tyrannis.*” If Mr. Bryan should become President, he could be “despotic” only as he represented the convictions of the people.

Again Mr. Bryan is wrong in thinking that “the withdrawal of power from the state would breed indifference to public affairs”; for have the people ever taken such an interest in “public affairs” in all our history as they do now? And was there ever such a “systematic absorption of power by the Federal government” as there is now?

<sup>1</sup> By Albert J. Beveridge. *Reader*. 9: 469-71. April, 1907.

Have we not, in the railway rate bill, asserted the right of the nation to control the railways of the republic? When was that ever done before? Never!

Have we not, in the pure food bill, asserted the right of the nation to protect the health of the people? When was that ever done before? Never!

Have we not, in the meat inspection law, required the packing houses of the *states* to be conducted by rules prescribed by the *nation*? When was that ever done before? Never!

Have we not established a national quarantine? When was that ever done before? Never!

Have we not established a Department of Commerce and Labor to bring the industrial activities of the American people under the supervision of the government of the American people? When was that ever done before? Never!

If space did not forbid I would cite a score of laws like these, showing a "systematic absorption of power by the Federal government," to use Mr. Bryan's words. And yet, have any of them "weakened the attachment of the people for the government," to quote Mr. Bryan again? On the contrary, was ever the attachment of the people for the government so intense? Have all these laws "caused discontent," again to quote Mr. Bryan? And, if they have "caused discontent," among whom is that "discontent" found? Not among the people, certainly; for the people applaud all these laws. But they have "caused discontent" among the wreckers of railways, the manipulators of the beef trust, the managers of the food and drug trust and all other buccaneers of business. If Mr. Bryan says that Democrats voted for these bills, the answer is that this *shows how dead "states rights" really is*, for these laws are violations of that theory.

That Mr. Bryan champions the cause of the San Francisco agitators, I am sorry; for I admire Mr. Bryan.

And if any cause is indefensible, it is the "cause" of these agitators. I know of no better illustration of the danger to the republic concealed in the states rights doctrine which the selfish policy of the British kings first planted on this continent, than this San Francisco-Japanese danger.

### THE BIG NATION AND THE LITTLE NATION

Let us look at the naked facts. The Constitution provides that:

All treaties made, or which shall be made, under the authority of the United States, shall be THE SUPREME LAW OF THE LAND; and the judges in *every state* shall be bound thereby, *anything in the constitution or laws of any state to the contrary notwithstanding.*"

That clause was written because of the helplessness of the republic in foreign affairs under the Articles of Confederation. All the rest of the world said to us, "You are not a nation—you cannot deal with us as a nation"—and that was the truth. To remedy that we put in the Constitution the statement that treaties "shall be the supreme law of the land," "*supreme*" above the Constitution or laws of any state" or even of Congress.

Now in what predicament does states rights place us? As a nation we make with another nation a contract called a treaty. That treaty is violated by a small clump of American citizens living in a subdivision of the republic, called a "state." The offended foreign nation says to this nation. "This treaty is violated—I demand reparation." We say to the foreign nation with whom we have made this contract, "Yes, we, as a nation, *did* make a contract with you and it *has* been violated; but it has been violated by another little nation inside of us. This little nation is called a 'state.' We—the big nation—have no authority over this little nation, called a state. This little nation is 'sovereign.'"

But the offended foreign nation whose contract with us, as a nation, has been violated, says, "I did not make a treaty with any little nation called a 'state'; I made a treaty with the only nation I know, the American republic." We answer, "That is quite true; but nevertheless this little nation is 'sovereign.' And we—the big nation—are powerless."

The foreign nation answers, "To whom, then, am I to look; to the little nation? No, for I made no contract with it. The contract I made was with you, the big nation—and I see in your Constitution that the treaties you, the big nation, make, are the '*supreme law of the land*,' the 'Constitution or law of any state *to the contrary notwithstanding*.'"

We answer, according to Mr. Bryan's theory, "Why, you are not to look to either. You are not to look to us, the big nation, because we have no power over the little nation. You are not to look to the little nation, because you did not make the treaty with it."

Very well!" says the foreign nation, "the treaty has been violated—you admit that. You cannot give me redress for this violation—you admit that. So I must go to war with you—the world will admit that, demand it." So we get into war with the foreign nation because of the action of a little nation within us which nullifies our Constitution and violates the pledges of the American republic. No! not *all* of this little nation called a state either, *but only a small part of it*.

#### A HYPOTHETICAL CASE

Suppose Nevada instead of California had excluded the Japanese just as California has done. No, not all Nevada either, but only *Reno*, Nevada; for it was not California but San Francisco that did this thing. And San Francisco did it under authority of an act of the legislature giving San Francisco's council authority over the

schools of San Francisco. Very well! substitute now Nevada for California, and Reno for San Francisco. An act is passed by Nevada's legislature by a majority of *one* vote giving Reno complete authority over Reno's schools. Reno's council, by a majority of *one*, excludes Japanese from Reno's schools. This violates a treaty made by the American republic with Japan. So we get into war with Japan. And in this war not only the sons of Nevada, but the citizens of the whole republic go to battle and lose their lives. For Japan does not make war on Nevada, but on the American people.

Yet Nevada has only *fourteen thousand registered voters*, of whom only *eleven thousand* actually vote. Of this number *five thousand five hundred and one* are a majority and this five thousand five hundred and one authorize Reno to nullify a treaty of the United States. And Reno's council, by a majority of *one*, excludes the Japanese. And yet in 1906 Reno had only about one thousand two hundred registered voters and nine hundred actual voters. So that *six hundred and one male citizens of Reno bring on a war which expends the treasure of ninety millions of people and sheds the blood of the republic's soldiers drawn from Maine and Florida and Washington and Indiana and Arizona*. Could anything be more absurd? Could anything be more awful?

And one word further about this California matter: San Francisco had an earthquake; its great buildings tumbled to the ground. The city was in flames. The governor failed to call on the nation for aid, and the state legislature was not in session. Nevertheless, the national government gave aid. Funston did not answer the call of the governor or legislature; Funston *answered the call of the flames*. And the nation applauded. Roosevelt's administration backed Funston up. Secretary Taft, before a committee of the Senate, voluntarily stated that, strictly speaking, the government had committed treason. Why? Because the Constitution says

that the nation shall supply its troops to suppress disorder *only when the governor or legislature calls for them*; and neither California's governor nor legislature had called for troops.

#### ONE FLAG OR FORTY-SIX

So in the San Francisco earthquake the Constitution was not only disregarded, but violated. Treason was committed. Taft, Secretary of War, admitted it. And yet nobody complained of this "treason." Everybody applauded this "treason." San Francisco was grateful. Why, then, this commotion about California's "rights" now, because of eighteen Japanese children, and no protest against the violation of the Constitution then, by the nation's troops aiding San Francisco in its sore distress? It does not appear very consistent, does it? Does Mr. Bryan approve of the Federal troops in San Francisco in the crisis of earthquake and flames? Does the Democratic Party approve of the action of the government in that case? If they do, why do they disapprove of the mild attitude of Roosevelt in pleading with San Francisco's mayor to avert a national war?

*Think of that!* The President of ninety millions of people pleading with the mayor of a few thousands of people to prevent those few thousands from plunging the whole ninety millions into war. To this deep humiliation—to this grave danger—states rights brings us.

This one word in conclusion: We Americans stand before the world higher than we have ever stood before. Every step upward in the world's esteem has been won by nationality. All the contempt of the world for us has been earned by the foolish doctrine of states rights sown in American soil by the English kings. Shall we be one people, the greatest force for righteousness beneath the skies, or shall we be forty-six peoples? That, in the final analysis, is the question. Shall we have one flag or forty-six flags?



FEDERAL USURPATION<sup>1</sup>

In a recent address upon federal encroachments upon state sovereignty Hon. Edward P. Budford, president of the Virginia Bar Association, said, "thoughtful citizens in all parts of the country are beginning to realize the dangers that threaten our institutions as a result of usurpation by the Federal government of powers" it was not designed to exercise, and he added that he constantly received letters from individuals and organizations in different parts of the country asking co-operation to check the usurpation "of *all* power" (*italics mine*) and the transformation of our Federal union into an unlimited bureaucratic empire. He quoted the governor of Virginia as saying, "the centripetal forces pulling everything in toward centralization in the Federal government have of late years grown so strong that they have well-nigh pulled our republic out of balance, —there is scarce one subject left to local control." Hon. Henry St. George Tucker in addressing the House of Representatives on May 10, 1924, said, "we are enlarging Federal powers by robbing the states of theirs." At that time he repeated these words from President Coolidge: "I am fearful that this broadening of the field of government activities is detrimental both to the Federal and the state governments. . . . Efficiency of state governments is impaired as they *relinquish* and turn over to the Federal government responsibilities which are rightfully theirs." Mr. Tucker also quoted Secretary of State Hughes as telling the New York Bar Association in 1916 that "an over centralized government would break down of its own weight." Governor Ritchie of Maryland in his second inaugural in January last called upon his people "to resist unwarranted encroachments of every kind by the Federal government upon the sovereign rights of our state and the guaranteed liberties of our

<sup>1</sup> By William C. Redfield. *Forum*. 73: 88-95. January, 1925.

people." It would not be difficult to find words of other thoughtful students of our polity to a similar effect.

A note of deep pessimism pervades this discussion. Observe the words "dangers," "threaten," "usurpation," "all power," "unlimited . . . empire," "scarce one subject left," "robbing," "relinquish," "unwarranted," etc., etc. The tendency which we are called upon to resist is said to be one which is wholly evil, threatening our liberties, menancing our property and our rights, and promising to undo all that has been gained by centuries of struggle for freedom. There is presented no bright side; no note of achievement is heard; no silver lining appears to the cloud which impends above us. We are in the path of the storm and must hasten to protect ourselves as best we may.

The discussion is notable, also, for an almost complete lack of details. It is conducted in purely general terms and, on the whole, with a singular absence of scientific method. The eyes of the pessimists are turned backward. Their mournful cries are based upon a past whose problems were unlike those of today, but they know it not. There is little of modernity in their thought and almost nothing that shows that they understand the movement against which they protest. There is also an entire failure to state that movement as it really is and to grasp its causes and the motivating forces behind it.

No one denies that there is a drift toward developing the scope of the Federal government and toward increasing its powers in fields which have hitherto been assumed to be reserved for state control. But this is only part of the truth, for there is also a similar drift toward developing the scope of state governments in fields hitherto reserved for county authorities. There is, as well, a drift toward the assumption by county or other similar governing bodies of powers hitherto exercised by towns or local units. Finally, we must admit

that even these smallest units have assumed new functions and are exercising new powers. The movement is universal not particular, general not localized. It is one of increased functions in all phases of government. No one phase can be separated from its fellows and made the subject of special debate without falling into the error of taking a part for the whole, and of losing sight of a great developing process in looking at one feature of its growth. That is failing to see the forest because of the trees. There is possibly quite as much danger of injuring humanity by insistence on a political principle, sound but not always and everywhere applicable in the same form, as there is from an alleged usurpation which no one contemplates, desires, or consciously promotes.

There seems to be no definite group, certainly no political party, that is devoted to increasing Federal functions. The movement on that side appears to be quite impersonal and non-partisan, almost non-political. Men of every party favor one step or resist another. Action seems to spring out of the demands of an expanding life rather than from any fixed purpose. No political party advocates expansion of government powers; some resent and resist it. Men elected on different platforms act favorably or the reverse, not according to rules but according to conditions. Successive steps are taken as new problems develop which call from time to time for solution. The record is rather one of patient waiting and thinking to learn of the reality of a problem than one of haste to usurp unnatural functions. Looked at from the human instead of from the political side, it is seen that many a step has been long delayed and has only been taken when suffering or sin or economic loss or an actual demand for human freedom has forced action through the power of moral law which adherence to a rigid political principle too long resisted.

For life is dynamic not static. It will not be re-

strained even by accepted political axioms which, however sound, may need readjustment to conditions of life which did not exist when they were formulated. Political creeds may, like religious ones, call for restatement not to destroy but to fructify them, to make them fit instruments to continue that human progress which they have done so much to promote.

The antagonists of what is called the tendency toward centralization in our government assert that the increase of Federal powers is necessarily accompanied by an injurious diminution of state functions, or by such duplication of them as involves needless expense and leads to inefficiency through the competitive action of state and Federal forces in the same field. They are not exact in giving details to justify the charge. It is sometimes merely assumed to be true, as when state bodies and Federal ones are enumerated having similar functions or names. So, also, there is a convenient silence respecting the growth of state functions at the (supposed) expenses of counties. Little is said of the enlarging demands of life, less still to show that the states so far from being weakened are, at least in some striking instances, more active, more efficient than in their whole prior history.

The advocates of the new Federal measures urge that they are necessary because some states either neglect to deal with acknowledged evils or have proved incompetent to do so, and because these evils, locally existent, are not local in their baneful effects but affect injuriously the whole body politic. There seems no middle ground of thought or statement. The evolution is said to be either wholly evil or altogether good. One side with static mental vision declares in effect, if not in words, that a political principle is at stake which experience has shown necessary to human freedom, and therefore to human happiness. The other side insists that the moral law and the human upward

impulse are superiors to political principles and are the creators of them, and declare that they do not seek to discard the particular principle concerned but to apply it effectively to the life of today. They urge that the movement does not modify local self-government in substance but in application, that a vast change has come over human affairs in recent years altering social, industrial, and economic life. The world, say they, has moved and is moving, and with its movement has come of necessity a change in the relations of every political unit to one another; and a readjustment must be made in which interdependence and cooperation will take the place of independence and separation. Their view is that the new force of cooperation providing for mutual endeavor is superseding the extreme forms of local and state separateness, and that this, so far from injuring the lesser powers, actually enhances them. They aver that local freedom and state initiative are not menaced but stimulated, and that fresh, vigorous blood is entering into the arteries of our body politic restoring and reviving it.

There is, of course, ample ground for difference of opinion between sincere men on such a subject, which has its roots in a treasured past and reaches out to a boundless future. There are, however, certain questions rarely raised, if at all, in the discussion which it is well to ask. What, precisely, are the "dangers that threaten our institutions?" May we not have some clear statement of them—for if real they can be definitely stated—so that we may avoid them? Is it actually true that we are threatened with a "usurpation of *all* power" by the Federal government? Will either the noun "usurpation" or the adjective "all" in the phrase quoted bear analysis of their precision and fitness? Whence does the alleged "usurpation" spring? Is it so skilfully conceived and faultlessly executed that only a limited elect can discern its presence and progress? Or, on the other

hand, do the acts called usurpations arise at least sometimes from the demands of the very citizens whose rights are said to be usurped, or in others from an outraged conscience on the part of the greater community whose health and happiness are endangered by a Tory resistance to light? Is not there ground for occasional suspicion that the charge of the menace to political liberty is on the lips of those who use it on behalf of maintaining a certain industrial slavery? Do our governors and state legislatures actually find that there is "scarce one subject left to local control" so that their functions are becoming non-existent, save only that the right and duty of protest remains? One gets, perhaps wrongly, the impression from public prints and private contacts that our state officials think, at least, that there is quite a little for them still to do. Is there not somewhere a voice now and then lifted to suggest enhanced compensation for legislator or governor on the ground of increased service? What, specifically, is it that states have really relinquished and turned over to the Federal government, as President Coolidge suggests? Will not even this more moderate statement require mollification to adjust it to the facts? Finally, is there not present in what has been quoted, and in much that has been said elsewhere, some of that exaggeration which forms so unfortunate a part of our American public discussion? Is there not absent a calm, careful study of the facts in all their relations? It is not here meant to imply that there is no justification for anxiety in the present situation. It is meant that no such subject should be treated on its purely negative side, and it is courteously suggested that the rôle of Cassandra was not a constructive one. Let us have the scientific method. What are the facts, all of them? What are their causes? Whence do they come? Tell us why they function as and where they do, and tell us, also, the extent of the facts, over what areas they operate and how. Do not



confine the inquiry to what the nation is doing to or for the states. Tell us what the states are doing with the counties, the counties with the towns, and what new things the latter are attempting. Then we shall have the whole picture and be able to see and judge it intelligently. Now the mists of doubt and the clouds of discontent conceal the verities.

The limits of an article forbid more than the merest suggestion of a thought which is modestly offered, not as a solvent of the problem which admittedly exists, but as a partial explanation of some of its phases and certainly as bringing a needed note of optimism. For it cannot all be bad. The drift cannot be wholly wrong. We are not deep in the slough and hopelessly sinking deeper. Surely there is somewhere firm ground on which to stand. Let us take certain known cases for examples. Does Federal aid to good roads weaken state initiative? Does it cause a state in reality to relinquish its powers? Does it menace the freedom of anyone, or does it in actuality set many free, at least from mud? Whose liberty is impaired or threatened by it? No state is obliged to accept it. Any or all may refuse at will and may continue to function alone provided the public will allow. Is it not the fact, however, attested beyond all question, that this particular "usurpation" has stimulated state action in many and marvelous ways, which have gone far beyond the sphere of the so-called Federal intrusion and have led to enhanced state pride and progress? It is respectfully suggested that North Carolina affords an eminent example of progress in this very respect arising from a fine initiative and accompanied by a courageous and intelligent exercise of local public opinion. Nay, it is further urged that in that state, as elsewhere, many minor local government units have felt the inspiration of the larger movement and with a new vigor have voluntarily responded to the impetus it has conveyed to them. "Florida," says



an Associated Press despatch, "rushes state road work," and, adds the same despatch, "counties are spending millions yearly in order to expedite construction." Are there not hints indeed of over-stimulation in some quarters? If aught has been relinquished, much appears to have been gained. To the man in the street it would appear as if many dormant local units had been awakened out of sleep, and as if some that were moribund had found new life.

Certain states have established in their rural districts state police or state constabulary, as they are variously called. Are the functions of the county sheriffs impaired by this "usurpation" of local powers by the state, or are they given a new and powerful ally in the very work and responsibilities with which they are charged? Whose liberties are endangered unless it be those of malefactors? Does anyone argue that the freedom of any well-behaved citizen is lessened because the state has thus begun to cooperate with counties and towns in preserving public order? Is not this an almost new function for a state to assume, one of recent development, and how is this fact consistent with the wail that there was scarce one subject left in state control? Some labor leaders, indeed, have objected to the formation of state constabulary, not, however, on the ground of political theory but because abuse of authority was feared. Happily the average good sense of our people has sustained the creation and maintenance of this newly formed and enlarging state function.

Even as this is written a notice publicly posted in a railway station appears to confound critics and to point the way of restoring to them that peace which they seem greatly to need. It tells of "agencies cooperating" and announces that the University of West Virginia Agricultural Extension Service and Experiment Station, the county farm bureaus, the lime and limestone manufacturers and leading railroads are acting jointly

to furnish and equip the "West Virginia Soil Improvement Special" train. This is soon to arrive accompanied by five soil specialists, and farmers are asked to bring specimens of soils to the train that then and there they may be analyzed by experts. The promise is made that counsel and instruction will be given free, and that enough material to treat an acre will be supplied gratis. Here at least is one function not suppressed by Federal power. Here is initiative and enterprise on the part of a state institution. One wonders, however, with the wails of woe still ringing in his ears, whether what seems on the surface to be helpful cooperation may not be some deep-laid plan of usurpation on the part of the railroad company, or how the associated counties regard the intrusion of the state institution into their local affairs. Indeed, it is rather more than suggested that the Federal aid which lies behind this cooperative action means a dangerous extension of the field of education.

Is not the solution of the vexed problem found in the changed conditions of social and economic life? Existence has become far more complex than it was fifty years ago, and its complexity increases daily. Many subjects, if not most of them, have become specialized. Agriculture and industry are now scientific callings. The farmer needs for practical use knowledge of the chemistry of soils and of applied botany as well as something of mechanics and of civil engineering. No one man's mind can cover the whole area of endeavor even in such a field as agriculture. On a recent visit to a small farm where scientific culture was highly successful the father and two grown sons were found to have divided the work, each specializing on one part of it, and the three cooperating in applied science to a common result. The call is ever for more truth, for greater light. Men are increasingly unwilling to "go it alone" as they realize how wide the field of knowledge is, how necessary it

is to cover it, and how hopeless it is for any individual to compass it all. Hence the call to others who know to come with help, to contribute their share of knowledge to the fund; hence the urge toward cooperation among men, among industries, among political units. Hence does the county come to the aid of the towns, the state to the aid of counties, the nation to the aid of states. The functions not of one but of all are increased in volume and effectiveness; the larger light, the broader experience, the greater vision are all put at the service of those who need them most and who—be it observed—are conscious of their needs and cry out to have them met. Nor does this cooperation diminish, much less destroy individual initiative. In conditions rapidly becoming too complex for any individual to cope adequately with them, it often affords the only chance for the individual to express himself adequately. It does for adult workers in many ways something of the same service that the common school does for the expanding minds of children, and it provides a symmetry and universality of education we long have needed and as long have lacked. So far from attacking liberty it sets men free from the shackles of ignorance; it supplements their weakness by the strength of their fellows and makes life richer and sweeter by its beneficent work. It leads not to despotism but to a new and larger freedom.

### STATES RIGHTS CRY DENOUNCED <sup>1</sup>

States rights, the question that caused a Civil War in 1861 and now threatens a national referendum on prohibition, Friday had worked its way into the National Conference of Social Workers.

How far should the Federal government go in dic-

<sup>1</sup> From *Cleveland Press*, May 28, 1926. This address will probably be published in full in the Proceedings of the Conference of Social Work for 1926.

tating the health programs of the state? In the face of a wave of individualism which he claims is sweeping the country, Dr. Richard Arthur Bolt, University of California, addressing delegates at the Statler Hotel, stepped out as a champion of extending Federal subsidies in state health programs. Dr. Bolt declared:

The insistent demands for personal liberty, states rights and national isolation indicate that Americans no longer are concerned with the well-being of their neighbors either at home or abroad. Our growing individualism is exemplified by the present disregard for law and order, by the self-sufficiency of the bootlegger and his well-to-do customer and by a moral supineness on the part of the so-called best people. Nationally our individualism is exhibited in attempts of a number of states to thwart ratifications of the child labor amendment, to restore alcohol to a respectable place in society and to erect such barriers to our entrance into the World Court as to restrict its usefulness.

In spite of the agitation for decentralizing government, Dr. Bolt predicted that the United States cannot long endure unless its people share equally in economic, social, educational and health benefits. This situation, he maintained, cannot prevail without strong Federal direction. Dr. Bolt said:

United States cannot tolerate with impunity conditions in any of the states which foster illiteracy, violence, immorality or enfeebled health. While making due allowance for local peculiarities, certain minimum standards must obtain and these the federal government has undertaken to secure thru the system of grant-in-aid to the states.

Federal grants-in-aid, the speaker contended, have proved the most effective means of encouraging the states to assume greater responsibilities for public health. Bolt lauded the Sheppard-Towner act as the most important piece of Federal legislation enacted in recent years for the promotion of public health and social welfare. In 1912, the speaker said, the total Federal appropriation to the states was approximately \$6,000,000. During 1925 this amount rose to \$200,000,000, an increase of more than 3000 per cent. Dr. Bolt declared:

Certainly healthy mothers and children are as great a national asset as well-bred cattle and fine pigs. Very few objections have been raised to the expenditure of huge sums of federal money to protect and improve livestock. Why object to similar expenditures for public health?

## THE NATION SHOULD SUPERINTEND ALL CARRIERS<sup>1</sup>

To clearly state a question, one may assume some matters as axioms without necessarily giving them adherence. When however, in a democratic country, the question put is political, such assumption justifies a suspicion that the speaker believes the sense of the majority, if not a majority of the sensible, to be in favor of the matters taken for granted.

In this spirit I regard as axiomatic these propositions—that corporations require governmental control; have received too little in the past, and will get a great deal more in the future; that the desire for such control grows largely out of the majority belief that men accustomed to large affairs are somehow untrustworthy, and must be restrained by those less competent in business but more numerous at the polls; that any business affected by a public use must be regarded as a public trust, wherein the trustee is to be governmentally coerced into conduct primarily pleasing to the majority, and it is charitably and sometimes pharisaically hoped, incidentally profitable to himself; and that this governmental control must usually be in the hands either of Congress or a legislature, but in some cases should be divided between them. After making these assumptions, I believe the subject in hand is an inquiry, as to which control center will upon the whole yield the greatest degree of justice, compatible with public convenience.

<sup>1</sup> By C. M. Hough. *Annals of the American Academy.* 32: 218-24. July, 1908.

If the discussion were to take full scope, it might well be asked why *corporate* control only should be considered, for it is obvious that control of corporations as corporate bodies is a comparatively small matter. It is control of *business*, at present largely conducted by chartered companies, that is the question of the hour, in a day when economics have become politics, and political economists are thought producible by referendum or initiative. If business is to be controlled, it is obvious enough that the substance thereof and not the form of transacting it must be finally regarded by the law—partnership and private affairs will not be protected from governmental supervision by any absence of incorporation.

Since, therefore, several hundred years of legal history have marked the business of a public or common carrier as one peculiarly within the regulatory or police power of the sovereign, I have ventured, on your president's kind invitation, to speak regarding, not the legality, nor immediate possibility, but ultimate necessity of national control of carriers if the demand for supervision remains insistent. The argument of convenience will usually win in the long run, unless it encounters a moral principle, and that argument favors a centralized control, removed alike from local prejudice and local pride. Is there any moral principle, requiring a business covering navigation, railroads, expressage, telephony and telegraphy, to remain for the most part under the control of forty-six sets of regulations and regulators, when the business itself is national and international, and competition has perceptibly become an economic international conflict?

The impossibility of a fair uniformity, or uniform fairness on the part of so many laws, legislatures and commissions, to the men and affairs regulated, will in time weary all but those who hope for place under one of the conflicting systems, or doctrinaires to whom a theory is dearer than the removal of conditions, however odious.



For modern evidence of how divergent and irreconcilable in scope and purpose, and how impotent for ultimate good, our present multifarious systems are and must be, one need but read the published reports of proceedings of the National Association of Railway Commissioners, bulky volumes, not to be considered without sorrow and some cynical amusement.

Secretary Root has recently appealed to the several states to bestir themselves for more efficient governmental regulations, and to subordinate local interests to general welfare. His voice is of one crying in the wilderness, for it is as true now as when Mr. Pinckney said it in 1787, that "States pursue their interests with less scruples than individuals." The Supreme Court has already repeatedly considered endeavors of state authorities to compel the transaction of railway business in a particular state or part of a state at a loss, upon the plea that the interstate business of the compelled corporation was sufficiently profitable to warrant the local gift. Such a gift is indeed a benevolence in the legal and disreputable meaning of the word. Nor has it been unknown that men in local authority have threatened carriers with drastic hostility in local matters, were not interstate rates made more agreeable to constituents. This is retaliation, not administration, and until the unity of commerce is recognized by putting its agencies under one control, such manifestations of local self-seeking will continue, and probably increase.

It is now notoriously true that the carrying enterprises of the nation, from railways to telephones, are largely owned (if not abroad) in parts of the union remote from the carrier's region of operation. Can it be denied that the last few years have shown a determined recognition and punishment of absentee landlordism on the part of local authorities engaged in regulating carrying corporations? Such denial is impossible, and it is



equally impossible to anticipate a termination of that condition as long as local capital remains as limited as it is in most of the United States while local rates for money remain higher than the highest return reasonably to be expected from the carrying trade conducted through corporate organization. In most of the states local money does not go into the carrying trade, because it can be more gainfully employed otherwise, but that fact never induces local authorities to recognize the local money rate as the carrier's return rate. It is surely a legitimate position for the public to take, that the owners of the carrying corporations shall have a voice, however still and small, in the selection of their regulators, by making the selection a national and not a local affair.

Again, if conditions perfectly well understood in our older and richer states be considered, the observer must recognize as a figure familiar in the business and political background the corporation of numerous local shareholders of large local influence, and for the time being obnoxious to no considerable class in the community. Has a foreign rival, a new competitor, a fair chance before the local regulatory bodies in opposition to such a carrying corporation? No man of experience in interstate business can answer that question affirmatively, and by just so much as local regulation becomes more organized and better established and more drastic if not more efficient, by just that much will local pride and local prejudice give to local enterprises a preference undue under the law and undesirable for the people at large. Nor is it either a vain imagining or a jeremiad that a really active, vigorous and selfishly able administration of the carrying business by the coast states may become, and in no long time, a serious grievance to interior producers.

But it is not an unusual change of public attitude for a corporation to become, through the misdoings of

one man or the mistakes of a few, an object of local execration. Its pursuit and punishment become political virtues, in which all parties strive to excel. This condition is so frequent today, that to name any special corporation would be an invidious distinction. Will not national control allay, if not prevent, local inflammation and render more difficult destruction of what should be cured, but need not be killed in the process?

The relation of foreign to domestic commerce is a subject not to be exhausted by many hours of discussion, and it is of growing importance. The two are interdependent. If domestic operations are disturbed or ill-managed, foreign commerce will suffer. While no matter how well arranged the local management of a state's commercial affairs may be, no one state is strong enough to withstand, and indeed it will not ordinarily discover until too late, foreign domination of its domestic commerce. I do not admit this to be wholly a glance into the future, but the facts of today are not publicly understood, and probably nothing will convince any considerable portion of the people of the United States that a real danger here exists, until they discover themselves pecuniarily injured, and by overwhelming evidence.

There is another matter very presently before the public, and as to which the utter inefficiency of state control has been demonstrated beyond peradventure. Next to land investments, the railroads of this country most largely represent the savings of the labor of an industrious people for some hundreds of years. Mr. Mather, of the Rock Island Company, said last fall: "There is a prevailing public belief, based on facts publicly known, that railroad corporations have issued corporate obligations and applied the proceeds to purposes other than those for which such obligations may lawfully be issued." This he regards as the great railway wrong doing—well known and long continued, and

principally productive of that condition of the public mind, which renders our present discussion opportune. He need not have confined his indictment to railroads. The carrying corporations as a class are not more guilty than others, but they have greater opportunities of guilt. With inconsiderable exceptions every carrying corporation in the country is incorporated by a state. Have the states generally attempted to limit the capacity of their corporate creatures for working harm in this way? Certainly not. And can they do it? Considering how states bid against each other for corporate business, it is doubtful. Would they do it if they could? What inducement is there for either the legislative or the executive department of a small or poor state to control the financial operations of a corporation whose financial business is wholly conducted in other states? There is no self-interest requiring the regulations, and I doubt the power of altruism to bring it about.

No one believes, and I am as far as possible from asserting, that national control would be perfect or always wise, but it is necessary. If it be worthwhile to avoid unnecessary multiplication of conflicting laws; to set a bound upon local selfishness; to protect those citizens whose property is represented in carrying corporations of states not their own; to limit the power of some favored corporations; to protect perhaps the same corporations when political rancor turns against them; to recognize and foster the close relation between foreign and domestic commerce, while presenting a firm front to un-American domination, and to limit by national power the financial operations of common carriers of all sorts then national control must come. If these things be worth attempting or possessing, then so far as the legal framework of our country will permit, the effort of all thoughtful citizens should be to secure control of all the instrumentalities of commerce for the nation as opposed to any and every smaller governmental unit.

Whether the result which seems to me desirable be also constitutional is a question not to be elucidated in twenty minutes or twenty days—nor is this the place for such technical discussion.

I have not attempted a brief nor set a program, but have ventured to indicate a desirable goal toward which may press those who have no local axes to grind nor scalps to take and who believe that what is national in extent should not be parochially administered. It may, however, be safely asserted that the field of national control over the instruments of commerce has scarcely been surveyed, and the legal possibilities within that field are surely large enough in a country where the chairman of one of the committees which reported the Sherman Anti-Trust law declined to hazard an opinion as to what contracts were covered by the statute he favored, and put his refusal upon the ground that he did not know, and it was the business of the courts to find out.

Is this result, even if desirable and in large part legally attainable, practically possible? No man can tell until the attempt is made. National effort of every kind has in this country usually been regarded as a last resort, something only to be attempted when local failure was so evident that even jealousy could no longer deny the truth.

The present is a time as ripe as ever will be for endeavors to direct national power, not into new fields, but into portions of the old domain hitherto unsubdued. Perhaps, indeed, the present is a peculiarly appropriate time, for just now the cry of monopoly is so popular and the belief therein so widespread, that we have even been seriously told by a noted senator that no more than a hundred men control the business fate of this nation, and in proof thereof he has spread upon the long-suffering pages of the *Congressional Record* the names and corporate relations of that century of oppressors. Yet with such gravity does a people, which talks far too

much of its own sense of humor, regard these statements, that no one has objected that of these tyrants a considerable proportion some time since departed this life; and that one despot is hateful in part because he is a trustee of the Young Men's Christian Association—of Chicago, to be sure.

If, therefore, one does not believe in the present existence of grinding monopoly, yet recognizes the existing demand for regulation, I have already tried to point out reasons for urging national control; but every honest believer in monopoly will in time perceive that centralization cannot be successfully fought by parishes, nor monopoly by confusion, any more than was union by disunion. The ultimate argument will be, and indeed now is, that wherever national union is possible national regulation is necessary, and national cooperation, if not union, is already among carriers of all kinds more than a dream, and its actuality is regarded as beneficent by an overwhelming majority of business men whose opinions are commercially worth having; and these are the men who will more and more nationally unite to do that sort of business which requires national regulation. Will your personal influence be for efficiency in large matters and wholesome neglect in small? If so, I believe you will ultimately advocate national control.

### IS STATES RIGHTS A DEAD ISSUE?<sup>1</sup>

In the nation-wide debate that has been carried on over the proposed child labor amendment to the Constitution, we have, I think, witnessed a striking example of the peculiar weakness democracies seem to have for growing excited over obsolete issues while living issues go begging for consideration. I refer, of course, to the way in which we have sidetracked a living issue, the

<sup>1</sup> By Glenn Frank. *Century*, 109: 839-42. April, 1925.

issue of national control of child labor, and dragged from a decent and deserved grave what seems to me, at any rate, the deadest of dead issues, the issue of states rights.

I greatly respect the minds of many of the men who have fought the child labor amendment on the ground that it meant a dangerous encroachment on the rights of states. In many instances, I think that economic cupidity, resorting to intellectual casuistry, has sought to revive the doctrine of states rights as a mere smoke-screen for anti-social practices. But, in this paper, I am interested only in those opponents whose opposition is untainted by even the suspicion of any personal or purely economic interest, men who honestly believe their own arguments. I do not charge them either with cupidity or with casuistry. I suggest, however, that in their present attempt to revive the doctrine of states rights they are dramatizing democracy's distressing devotion to obsolescent issues.

In his latest book, entitled *A Year of Prophesying*, H. G. Wells tells of discussing the British political situation with a shrewd student of men and measures. Mr. Wells' mind is concerned primarily with the probable parties in Parliament. His friend is a man who lives in vivid reaction to the actual affairs of the moment. They fell to discussing the obvious disintegration of the parties in Parliament. True to their respective types, Mr. Wells was most interested in principles, his friend in personalities.

Mr. Wells displayed little interest in the Asquiths, the Lloyd Georges, the Birkenheads, and the Mastermans, whose future actions his friend was trying to forecast. Mr. Wells was secretly pleased by the prospect of the disintegration of the existing political parties, for he saw in such a debacle a chance for experimentation with a new political principle—the principle of proportional representation. He said as much to his friend and sug-



gested that, when the dissolution of all British parties came about, Great Britain would have to lead the way to a new stage of democratic government and "get itself a legislature of a more manageable size, elected by proportional representation."

"They won't," said Mr. Wells' friend, meaning by "they" Great Britain's millions of voters. "They can't grasp ideas like that—new, *difficult* ideas. It takes ten minutes' attention to understand proportional representation. You can't go to the country with a thing like that."

"But," protested Mr. Wells, "unless we get a more efficient legislature, how can we tackle our difficulties with money, with Europe, with India?"

His friend cynically remarked that parties don't tackle difficulties; they run away from them. "They'll run away from anything except office," he said.

The next big question for England," he said a little later, "is prohibition."

"But," said Mr. Wells, thinking, no doubt of many world issues of finance, education, international organization, "it is such a secondary matter."

"Exactly," replied his friend. "That's why it's going to be primary. It's trivial enough for a democracy to be really earnest about."

We may agree or disagree with Mr. Wells' side-swipe at prohibition, but it is difficult to dispute his cynical friend's arraignment of the mental habit of democracies. Most of us believe that democracy is, in the long run, the soundest and safest and sanest technic of government. Aristocracy, save when harnessed and held to responsibility by democracy, seems to go to seed, if not biologically, at least politically. Dictators sooner or later become poisoned by their own power—or by a constituent. With all its derelictions, democracy seems the most desirable. But democracies do have a way of fighting furious battles over issues that are either trivial or obsolete.



As I have already suggested, I think the current attempt to use the child labor amendment as a springboard into a campaign for a revival of the doctrine of states rights is a striking example of this democratic obsession with the obsolete. Let us review the steps by which the revival of the doctrine of states rights has been got under way.

When the proposed child labor amendment was put before the country, the students of American government rapidly segregated into two camps: the camp of the centralizers and the camp of the decentralizers. The apostles of a new nationalism began measuring swords with the apostles of a new localism. Roughly speaking, those who believe in a strong central government supported the amendment; those who believe in strong local governments opposed it. The centralizers said the national government should control child labor; the decentralizers said the state governments should control child labor.

It was not that the decentralizers were in favor of child labor. One of them said to me recently: "All my life I have ardently championed the rights of children to health, to education, and to freedom from slavery to the demands of backward industrialists. I believe that the proposed amendment would speed up the emancipation of the children. I do not think the power given to the national government would be abused or used unwisely. If this amendment did not sink its roots in an even greater issue, I would support it. But the time has come to call a halt in the increasing centralization of affairs at Washington. If this amendment passes, we may as well prepare for the end of local government and resign ourselves to a future of increasing slavery to an all-dominating central government that will, year by year, poke its fingers into more intimate details of our personal and professional lives. The root of the matter is this: for years we have been drifting into a centralization of

affairs at Washington; the time has come for a conscious decentralization of affairs. It's the only way we can bring reality back into American politics. And we cannot do better than to make a test case of this child labor amendment."

We are due to hear more and more about decentralization as time goes on. It promises to become the catchword of a new political movement. In this paper I want to suggest just one aspect of the problem that I think the decentralizers are overlooking. It is clear, I think, beyond need of argument, that we have carelessly committed to the jurisdiction of the national government many things that we should have kept under local jurisdiction. We have asked Washington to do many things Washington is not fitted to do. But we cannot correct our mistakes by carelessly committing to our state governments things they are not equipped to decide or direct. And the more we examine our present state governments, the less we are likely to look upon them as hopeful agencies for bringing anything like statesmanship to the consideration and control of modern social problems. To put it bluntly, I suggest that states rights is an obsolete issue because our state governments are largely obsolete. These geographical areas we call states, bounded by arbitrarily or accidentally drawn lines on a map, simply do not represent any distinctive social or economic interests.

Our states are not distinctive regions in which a special language, a special religion, a special culture, and a special kind of economic life set them apart from neighboring states. There are some slight differences of dialect and demeanor between the various sections of the country, but, by and large, our states are purely artificial units. One has only to cross the line that separates, say, Missouri from Iowa to realize the essential artificiality of our states.

I do not know of a single real interest around which the lives of modern Americans revolve that does not daily cross and re-cross state lines. The development of easy and cheap means of travel and communication and the growing industrialization of our society are making it less and less possible to regard arbitrary geographical areas as primary units of government. Fewer and fewer Americans, with each generation, live and die in the same state. As Mr. Wells pointed out several years ago, we have slipped from around our necks the tether that formerly tied us to any one place. We have become nomadic again. We are a generation of gadders. The old homestead is less and less a factor in our lives. Rapid transportation and easy communication have made of us a new race of Bedouins. And even when we live a lifetime in one place, our interests may extend into far sections of the country. One of my friends lives in New York, but all of his economic interests are in Tennessee and Arizona. The artificiality of our states is apparent when we stop to think that this man's political citizenship is determined, not by where his mines are, but by where his bedroom is.

In such a time, when virtually all of the real interests of modern Americans are straining against and breaking across the artificial lines that bound our states, it seems hardly reasonable to suppose that we shall achieve a more realistic statesmanship by a decentralization that will throw more and more things back into the hands of state governments.

This may sound as if I were pleading for an all-absorbing national government. This is far from my intention. In fact, I believe that the decentralization of government is one of the liveliest issues of our generation, but I believe that states rights is one of the deadest issues of our generation. I believe that our national government should be deflated; but I do not believe that this

needed deflation of our national government should mean an exaltation of our state governments in terms of a revival of the doctrine of states rights.

Our government has, I think, grown top-heavy. American politics is marked chiefly by an overworked President and an indifferent people. This is obviously an unhealthy situation. We need not more political government, but less. The way to a healthier national life lies, I am inclined to think, through a very great decentralization. But when we decentralize, I suggest that the last place to turn for statesmanship is to our state governments. The decentralization we need is not a decentralization from a big political organ to smaller political organs, but a decentralization that will take more and more things entirely out of politics and put them back where they belong in the various economic, professional, and occupational groups.

I do not believe it will ever be possible to create in the present generation or in future generations of Americans a sustained interest in politics. We are passing out of the age of politics, just because our political units and instruments have not been kept adjusted to the changing life of the modern world. The new nomadism and the new industrialism to which I have already referred have created a generation of people who are essentially delocalized, mobile, and interstate in their thinking, save when, by some transient appeal to state sentimentality, they revive a fading sense of local patriotism. These facts call for a wholly new political philosophy, a wholly new notion of government, a wholly new statesmanship. And when this new politics has been created, I suggest that its broad lines will be somewhat as follows:

There shall emerge a business statesmanship inside business, an industrial statesmanship inside industry, an educational statesmanship inside the teaching profession, and so on. These unofficial and non-political statesmanships shall give the nation the major part of its real

government. The various state governments will be less and less regarded as sources of policy, and more and more as local administrative organs with limited functions. The national government will do nothing politically that can be done by the statesmanship of an occupational group. The national government will more and more become the impresario and inspirer of these unofficial and non-political statesmanships. But all this is another story for another time.

## BRIEF EXCERPTS

The federal government greatly needs new powers.—*Charles W. Eliot. American Law Review.* 42:115. *January, 1908.*

A federal child labor law is the product of state failure to recognize responsibility.—*Charles Merz. New Republic.* 10:257. *March 31, 1917.*

A changeless constitution becomes the protector not only of vested rights but of vested wrongs.—*Outlook (editorial).* 87:19. *September 7, 1907.*

Almost every advance in governmental activity has been resisted in the name of states rights.—*John E. Briggs. Iowa Law Bulletin.* 10:305. *May, 1925.*

Corporations engaged in interstate commerce must be brought under the federal control. No state control is or can be adequate.—*Outlook.* 82:96. *January 13, 1906.*

It is clearly inevitable that the field and activities of the federal government must increase.—*Theodore E. Burton. Annals of the American Academy.* 32:215. *July, 1908.*

Without the votes of Democratic members of the Congress the Child Labor amendment would not have

been submitted for ratification.—*National Platform of the Democratic Party*, 1924.

The truly national interests which require unified legislation are far more numerous than they were when the country consisted of thirteen independent sovereignties.—*William L. Chenery. Century*. 109:604. March, 1925.

What the country needs is a uniform and harmonious system of railway regulation, and we cannot think that this will be given by unsystematic and inharmonious legislation by the different states.—*Outlook*. 85:638. March 23, 1907.

The man to whom the words "State's Rights" are a shibboleth is sometimes more disturbed by fancied dangers to the Constitution than he is by real injury to or oppression of the people.—*Outlook (editorial)*. 84:949. December 22, 1906.

Political danger lies in weakening central authority. The indications are that the bands of union will require bracing, and legitimate influence in this direction should be fostered.—*E. W. Gillian. Magazine of American History*. 14:186. August, 1885.

Mr. Bryan is himself as great a "centralizationist" as our wonderful young president, and even a greater one, I am sorry to say—for does Mr. Bryan not advocate government ownership of railways?—*Albert J. Beveridge. Reader*. 9:468. April, 1907.

The states have shown that they have not the ability to curb the power of syndicated wealth, and, therefore, in the interest of the people, it must be done by national action.—*Theodore Roosevelt. From an address before the Harvard Union*. February 23, 1907.

The south was the traditional home of the states rights doctrine. Yet in 1850 the south as a unit favored the enactment of the federal Fugitive Slave Act.—*Col. A. W. W. Woodcock. United States District Attorney for Maryland. Report Maryland State Bar Association, 1924. p. 93*

Every state has a right to protect its own children; yet no state can do this effectively while neighboring states let down their bars. Child labor can no more be held in by state lines than an epidemic or forest fire. We need a national law to meet a national evil.—*Alice Stone Blackwell. Woman Citizen. 9:17. December 27, 1924.*

Remember also that many of the men who protest loudly against effective national action would be the first to turn round and protest against state action, if such action in its turn became effective, and would then unhesitatingly invoke the law to show that the state had no constitutional power to act.—*Theodore Roosevelt. New Nationalism. p. 63.*

The national government must in some form exercise supervision over corporations engaged in interstate business—and all large corporations are engaged in interstate business—whether by license or otherwise, so as to permit us to deal with the far reaching evils of over capitalization.—*Theodore Roosevelt. Outlook. 82:886. April 21, 1906.*

One of the strongest arguments in favor of the relinquishment of all powers of sovereignty to the general government is the latter's frequent embarrassment when confronted with its own helplessness in compelling the people of every state to observe its agreements with foreign powers.—*Central Law Journal (editorial). 68:115. February 12, 1909.*



Little permanent good can be done by any party which worships the state's rights fetish or which fails to regard the state, like the county or the municipality, as merely a convenient unit for local self-government, while in all national matters, of importance to the whole people, the nation is to be supreme over state, county, and town alike.—*Theodore Roosevelt. Autobiography. p. 351.*

The simple truth in the whole complicated story of the American railroad business is that discrimination has been carried to the point at which the public balks. In both the freight and the passenger service the people in general have been "done," cleverly and comprehensively, in the interest of a small and powerful privileged class.—*Independent (editorial). 62:568-9. March 7, 1907.*

The tremendous changes in political and social conditions due to the adoption of improved means of transportation and to the establishment of the factory system have brought with them problems whose solution seems to be impossible under the principles of law which were regarded as both axiomatic and permanently enduring at the end of the eighteenth century.—*Frank J. Goodnow. Social Reform and the Constitution. p. 1.*

I cannot believe that we are to suffer from any usurpation of the executive or any other power [department]. How can there be usurpation when this free people every four years can choose a President and review his policies? Is it possible? . . . Let no man be afraid of the republic or of the extension of federal power. This extension will go on normally as befits a growing and a free people.—*Theodore E. Burton. Annals of the American Academy. 32:216. July, 1908.*

In Mississippi more than one fourth of all the children 10 to 15 years of age were at work; in Alabama

and in South Carolina, 24 per cent; in Georgia, 21 per cent; and in Arkansas, 19 per cent. Of the New England states, Rhode Island had the largest proportion of children from 10 to 15 years of age, 13 per cent, employed in gainful occupations.—*Child Labor Amendment to the Constitution of the United States. House Report No. 395. 68th Congress, 1st Session. March 28, 1924. p. 6.*

There is no doubt that the constitution fails to respond in large degree to modern conditions. It lacks the elasticity and fluency of the unwritten constitution of Great Britain, for instance, and as the years pass its deficiencies will become cumulative and there will be a demand for revision which cannot be gainsaid. There is a probability that this time is nearer at hand than the conservative minds of the nation are willing to concede.—*Henry Litchfield West. Forum. 42:399. November, 1909.*

States' rights should be preserved when they mean the people's rights, but not when they mean the people's wrongs; not, for instance, when they are invoked to prevent the abolition of child labor, or to break the force of the laws which prohibit the importation of contract labor to this country; in short, not when they stand for wrong or oppression of any kind or for national weakness or impotence at home or abroad.—*Theodore Roosevelt. From an address before the Harvard Union. February 23, 1907.*

The problem which the gainful employment of two million children under sixteen years of age today presents to the American people is a national problem of the first magnitude. It has to do primarily with a question of race development. What these two million children are now and will be twenty years hence raises questions

which are fundamental for the welfare of the human stock and for the happiness of this land of ours.—*Samuel M. Lindsay. Annals of the American Academy. 27:332. March, 1906.*

The opposition of the National Association of Manufacturers to every rational and moderate measure for benefiting workingmen, such as measures abolishing child labor, or securing workmen's compensation, caused me real and grave concern; for I felt that it was ominous of evil for the whole country to have men who ought to stand high in wisdom and in guiding force take a course and use language of such reactionary type as directly to incite revolution—for this is what the extreme reactionary always does.—*Theodore Roosevelt. Autobiography. p. 491-2.*

So it is with the great questions which group themselves round the control of corporations in the interest of the people. There has been a curious revival of the doctrine of state rights in connection with these questions, by the people who know that the states can not with justice to both sides practically control the corporations, and who therefore advocate such control because they do not venture to express their real wish, which is that there shall be no control at all.—*Theodore Roosevelt. From an address delivered before the Harvard Union. February 23, 1907.*

In 1920 over 1,000,000 (1,060,858) children 10 to 15 years of age, inclusive, were reported by census enumerators as engaged in gainful occupations. This number was approximately one twelfth of the total number (12,502,582) of children of that age in the entire country. The number of child workers 10 to 13 years of age, inclusive, was 378,063. The census does not report the number of working children under 10 years of age.—*Child Labor Amendment to the Constitution of the*

*United States. House Report No. 395. 68th Congress, 1st Session. March 28, 1924. p. 5.*

If we in the United States try to pass a law through Congress to protect the morals of our people by prohibiting lottery tickets from interstate commerce, it is resisted at once upon the ground that it interferes with the rights of our states. If the Beef Trust, with packing houses located in a state, prepares and sells diseased meat to the people of the whole country and we try to prevent this by a national law, we hear learned arguments of the "constitutional lawyers" about this being an infringement on the rights of states. Scarcely a single evil has been practiced on the American people by selfish interests which, when attacked in our national Congress, has not hid itself behind the American doctrine of "States' Rights."—*Albert J. Beveridge. Review of Reviews. 44: 471. October, 1911.*

Congress must be enabled to settle all questions of national concern, and must have the range of the objects under its dominion extended sufficiently to prevent any petty local legislature from being able to thwart the will and endanger the welfare of the whole people. It must have full power to regulate the entire question of transportation, in order that artificial boundaries may not be the shelter and refuge of those powerful combinations who now regulate it to suit themselves. For the reason that transportation is so intimately allied to commerce that the two cannot in practice be separated, as well as for other reasons hardly less cogent, the establishment of a uniform code of commerce for the whole country must be included within its province.—*Isaac L. Rice. Century. 6: 540. August, 1884.*

What was formerly mere local business has now become state business, and what was formerly mere state

business has become national business. There has been an extraordinary expansion of trade, of transportation, and of American life. Our commerce is now continental in its scope; our corporations and our labor organizations are national and even international in their operations. Consequently the national affairs in which the National government may concern itself have become much more numerous, while the state affairs in which state governments may concern themselves have decreased in volume. In other words, political concentration, so-called, is the direct result of financial concentration. It is an effort of government to expand to the size of commercial operations.—*Wall Street Journal quoted in Literary Digest*. 36:4. January 4, 1908.

The question, how far this grant of power to Congress, particularly in respect of regulation of railway rates, impairs or modifies the authority of the states as to prescribing rates for carriage wholly within the state by interstate carriers, has been much debated. It seems to me quite obvious that if each state has this power, its exercise by all necessarily and directly affects the rates for interstate carriage. It is not just to these carriers, nor in my judgment is it expedient, to attempt thus to control them by so many different authorities. Ultimately, I venture to say, it will be perceived that such efforts are an invasion by the states of the field of national sovereignty, and, broadly speaking, the entire authority over this subject will, by common consent, be remitted to the general government.—*S. S. Gregory. Michigan Law Review*. 7:386. March, 1909.

I find it difficult to believe that capital, with its specialized views of what constitutes its advantages, its duties, and its responsibilities, and stimulated by a bar moulded to meet its prejudices and requirements, will ever voluntarily assent to the consolidation of the United

States to a point at which the interference of the courts with legislation might be eliminated; because, as I have pointed out, capital finds the judicial veto useful as a means of at least temporarily evading the law, while the bar, taken as a whole, quite honestly believes that the universe will obey the judicial decree. No delusion could be profounder, and none, perhaps, more dangerous. Courts, I need hardly say, cannot control nature, though by trying to do so they may, like the Parliament of Paris, create a friction which shall induce an appalling catastrophe.—*Brooks Adams. The Theory of Social Revolutions. p. 219.*

We cannot deal with the problems national in character, which are presenting themselves for solution, such as the creation, management, and control of interstate corporations; such as the regulation of concentrated wealth; such as the regulation of insurance; such as marriage and divorce, and many others that could be named, because the hands of the people and of their government are tied by constitutional limitations. It is the most supreme egotism, to say nothing of folly, for one generation of men, perchance inhabiting a mere fringe of land along the Atlantic Coast, a generation to whom steam and electricity, and corporations and concentrated wealth were almost or entirely unknown, to lay restriction upon the manner of the solution of problems by future generations, the nature of which they, by no possibility, could foresee.—*Louis A. Stubbins. Chicago Legal News. 40:368. June 27, 1908.*

A government which acts as a trustee for the common interest must hold itself in readiness to control and check if necessary forces that may operate subversively to the good of the people. And in a country of divided sovereignty, like the United States, common sense would seem to ordain that power to cope with new forces

should be conferred upon state or nation primarily with a view to efficiency. Twenty years ago this appeared to be recognized by intelligent men of all parties. Only the Bourbon rejected violently the program of extending the powers of the federal government to cover the fields in which state action was ineffective, and the establishment of the principle of harmonious state and federal cooperation. But in these two decades a change appears to have come over the public mind. The Bourbons have come out into the open with the anti-constitutional doctrine that the constitution must be left intact as it stands. —*New Republic*. 41:109. December 24, 1924.

We point with pride when we say that all the states have now adopted the Negotiable Instruments law, but a reference to the able work of Joseph Doddridge Brannan, professor of law Emeritus in Harvard University, on the Negotiable Instruments Law will show the several and various changes in the act as enacted by the various states and even a hurried perusal of that book discloses that easily fifty per cent of the sections of the law have been changed in some way in enactment or subsequent amendment in at least one state, and that many sections have been altered by the legislatures of several states. . . . But it is in the field of judicial interpretation that the most serious injury is being done to the purposes sought to be secured in uniformity of legislation and, of course, it is right in this connection that the bar has a most difficult task if it will preserve uniformity. —*Herbert M. Bierce. Commercial Law League Journal*. 30:675. December, 1925.

I am strongly inclined to believe that the interstate railways of the country must at an early date be incorporated under the federal government, and be under its jurisdiction. They are a part of the nation's life. They



are its great arteries of trade. If a road runs through six or eight states, and one state seeks to lower rates almost to the point of confiscation, that is injurious to all the states. In a city in the middle west an ordinance was passed that no express train should pass through the wide limits of the municipality at a greater rate of speed than four miles an hour. What was the result? Express trains between west and east were delayed twenty minutes by this absolutely unnecessary regulation, framed with a view to compelling [sic] the railway company to make certain concessions to the municipality. If a score of towns had adopted similar ordinances communication between the separate states of the country would have been very much hampered.—*Theodore E. Burton. Annals of the American Academy.* 32: 217. July, 1908.

President James of the University of Illinois in an address before the Minnesota Teachers' Association last week argued strongly that the education of the people should be made a national and not a local or state function. He startled his hearers by declaring that in no other great civilized nation is there so large a population in such educational degradation as the American negro, and so deprived of educational opportunities. In no other civilized nation are there, he adds, so many worthy members of the community in such a state of ignorance, and provided with such meager educational advantages as are the "poor whites" of the mountains and the "crackers." In no other civilized country, he says, are the teachers in the rural districts and in many towns so unskilled and incompetent, and in no other civilized country does the nation concern itself so little with the educational interests of the people as a whole. President James would have the federal treasury take the burden of education from the states.—*Independent (editorial).* 69:1053. November 10, 1910.

The slaveholders shielded themselves behind "state's rights," just as the *unrighteous* money interests—(for not all money interests are unrighteous by any manner of means—most are honest, just as most men are honest)—are now protecting themselves behind state's rights.

Slavery, under the disguise of state's rights, went on declaiming about "centralization," just as the robbers of the people under the disguise of state's rights are doing today. And finally came secession, which was state's rights *carried to its logical conclusion*, and then our great Civil War. That war was nothing but the financial interests of slaveholders defending their unholy institution behind the breastworks of "state's rights." Most of the gallant men who fought and died for the cause—and better men never marched to battle—honestly believed that they were fighting for local self-government; when, as a matter of fact, we now know that their lives were being sacrificed by a slaveholding oligarchy to save that oligarchy's property in human flesh and blood.—*Albert J. Beveridge. Reader. 9:468. April, 1907.*

The Progressive Party, believing that a free people should have the power from time to time to amend their fundamental law so as to adapt it progressively to the changing needs of the people, pledges itself to provide a more easy and expeditious method of amending the federal constitution. Up to the limit of the constitution, and later by amendment of the constitution, if found necessary, we advocate bringing under effective national jurisdiction those problems which have expanded beyond reach of the individual states. It is as grotesque as it is intolerable that the several states should by unequal laws in matters of common concern become competing commercial concerns, barter the lives of their children, the health of their women, and the safety and well-being

of their working people for the profit of their financial interests. The extreme insistence on states' rights by the Democratic Party in the Baltimore platform demonstrates anew its inability to understand the world into which it has survived or to administer the affairs of a union of states which have in all essential respects become one people.—*National Platform of the [Roosevelt] Progressive Party*. 1912.

Splendid instrument of government as is the United States constitution from many points of view, it has certain very serious demerits. It was framed to provide safeguards against dangers which have long since disappeared, and to encourage certain forces which today are more in need of control. The states are given a wide autonomy; the nation is checked on every hand by *ultra vires* provisions. This was well enough so long as the states were little countries by themselves, cut off by wide economic and social gulfs from each other. But now that there are common problems and common perils throughout the whole union, to arm localities with obstructive powers is to play into the hands of reaction and dishonesty, and to make any continuous national policy impossible. Unlike the custom in most federations, all powers not specifically delegated to the central government are assumed to remain with the states, which are thus treated as the more important unit. Hence, when a new question arises for which no delegated powers have been provided, the central government is helpless, however desirable it may be that the matter be treated as national rather than local.—*Living Age*. 252:183. January 19, 1907.

With the changes in everything else during the last hundred years, it would have been singular if there had not been changes in the general system of the government. The tendency has been towards increasing the

power of the federal government. . . . The entire United States of America is to-day for practical purposes more compact than the states of Delaware in 1789. Railroads, telegraph, telephone and radio [and motor vehicles] have accomplished the miracle. . . . With the improvement in communication there is more need for uniformity in laws that effect business and intercourse. . . . Gentlemen may talk all they wish about states rights. This legislation [Child Labor Law] will come because it is inevitable in view of modern conditions. And how unfair the present lack of uniformity is! Massachusetts manufactures under modern laws restricting to high priced adult labor, and must compete in an open market with a Georgia manufacturer who is free to employ children. On the one hand, there is the argument that states rights are invaded. On the other, the general demand for federal action upon a subject which in its very nature requires uniformity of treatment. —A. W. W. Woodcock. *Report Maryland State Bar Association*, 1924. p. 88-93.

The recommendation of the committee of the Bar Association that the manufacture and sale of pistols and revolvers and their cartridges should be absolutely prohibited by law, would seem to be one method by which the American people could effectively deal with the crime situation. If the manufacture of pistols, revolvers, and similar firearms, and their cartridges were absolutely stopped, it would be only a short time before it would be possible completely to disarm the criminal population of this country. . . . But unfortunately there are serious legal difficulties in the way of bringing about so sensible and so simple a result. The effective way to deal with the situation is through a federal law which will prohibit the sale, manufacture, and possession of a pistol or its cartridges by any person in the United States, except some official of the government, or person who, in the

conduct of his affairs, needs to go armed, such as bank messengers or similar employees. But apparently the Federal Government is without power to enact legislation of this kind. As is well known, it possesses only those powers which the states have been willing to relinquish to it, and this, apparently, is not one of them. To wait until each one of the forty eight states can enact adequate legislation dealing with this subject means waiting a long time.—*Lawrence Veiller. World's Work. 51:142. December, 1925.*

A large motor truck packed high with half-completed garments roars its way toward the ferryboat on the New York side of the Hudson river. Its engine is stilled as a position on the floating bridge is obtained, and within twenty minutes the manufacturer whose possessions are being transported has abandoned the jurisdiction of the sovereign state of New York and found refuge in the neighboring principality of New Jersey. A few days later the same truck approaches the Hudson river from the Jersey shore. It is now laden with finished clothing. Within the intervening days women and little children have completed the tasks sent them by the New York manufacturer. The home work thus performed is in violation of the laws of New York and of New Jersey. The New York authorities cannot deal with it because the offense is committed beyond the boundaries of the state. The New Jersey authorities are impotent because the manufacturer is a resident of New York and maintains his establishment within that jurisdiction. By this easy device certain men who seek to make profits out of the cheap labor of children are enabled to laugh at the laws. The constitution gives Congress control over interstate commerce. The Supreme Court has held, however, that the right to enact laws regulating child labor is beyond the powers delegated to Congress by the fathers of the country.—*William L. Chenery. Century. 109:599. March, 1925.*

The evil of conflicting commercial regulations, which led to the adoption of the constitution by the colonies, still exists in the matter of insurance, for individual states have vied with each other in passing restrictive, discriminative, and retaliatory legislation against the insurance corporations of other states. The United States is the only government in which such power is decentralized and permitted to remain in a constituent state. . . . The Supreme Court has never had occasion to consider the validity of a federal statute to regulate insurance. . . . Insurance is but a form of co-operative banking, and by enlarging its purposes the end referred to [federal regulation] might be attained. If, however, Congress is without present power under the constitution, then the serious question presents itself whether the evil to be rendered is not of sufficient magnitude to justify a constitutional amendment. Personally I think it is. Conditions have arisen of which the framers of the constitution had no conception whatever. An amendment should be passed, if necessary, to regulate insurance, the importance of which can be measured by the fact that, as an institution, it collects more money each year than the government itself, disburses more than the receipts of all the customs houses, and administers an accumulated treasure greater than all the money now in circulation in this country or the entire capital of our national banks. —James M. Beck. *North American Review*. 181:197-201. August, 1905.

There has always been opposition to any proposal for the limitation of employment. Manufacturers wish to be free to hire labor on the best terms possible. In 1915 Congress passed a law forbidding the transportation from state to state of goods on which children between 14 and 16 had worked at night or more than eight hours a day. The Supreme Court set aside the law. (247 U.S. 251). In 1919 Congress imposed a tax of 10 per cent



of the net profits for the year on all establishments in which any child between 14 and 16 had worked at night or more than eight hours a day. This was declared unconstitutional in May 1922. (259 U.S. 20). Now there is before the state legislatures the ratification of the proposed 20th Amendment to the Constitution of the United States, which is as follows:

Section 1. The Congress shall have power to limit, regulate, and prohibit the labor of persons under eighteen years of age.

Section 2. The power of the several states is unimpaired by this article except that the operation of the state laws shall be suspended to the extent necessary to give effect to legislation enacted by Congress.

Opposition has developed on every side, fostered by misrepresentations, especially the claim that no person under eighteen could run an errand if the amendment were adopted, and that children could not work on farms. Chambers of Commerce and Manufacturers' Associations are fighting ratification.—*Social Progress, A Handbook of the Liberal Movement.* p. 192.

A narrow or niggardly or selfish policy, if adopted by any one of the states through which a railroad passes, may seriously cripple and depress the commerce of every other state which the railroad serves. . . . [In two cases] state rates have been greatly reduced for the avowed purpose of preserving state markets for state trade, and thus excluding and discriminating against the trade of other states. . . . Sixteen states have enacted statutes, each asserting for itself the individual right to control the issue of stocks and bonds of interstate carriers. . . . Another striking illustration of the exercise by one state of a power to discriminate against and to injure the commerce of other states and interstate commerce is found in the state laws which impose heavy penalties for failure to furnish cars or other instrumentalities of commerce within a limited time. . . . In addition to what has been said, a long and formidable list of



state statutes, already in effect, might be given, which, without the consent of other states, impose serious burdens of expense upon their commerce, and thus upon their people. Thus, three states have passed laws making it illegal for a carrier having repair shops in the state to send any of its equipment, which it is possible to repair there, out of the state for repairs in another state; fifteen states have attempted to secure preferred treatment of their state traffic, either by heavy penalties for delays or by prescribing a minimum movement of freight cars—etc.—*Alfred P. Thom. Proceedings of the Thirty-fourth Annual Meeting of the Bar Association of Tennessee. 1915. p. 88-92.*

One of the most important conservation questions of the moment relates to the control of water power monopoly in the public interest. There is apparent to the judicious observer a distinct tendency on the part of our opponents to cloud the issue by raising the question of state as against federal jurisdiction. We are ready to meet this issue, if it is forced upon us. But there is no hope for the plain people in such conflicts of jurisdictions. The essential question is not one of hairsplitting legal technicalities. It is not really a question of state against nation. It is really a question of special corporate interests against the popular interests of this nation. If it were not for those special corporate interests, you never would have heard of the question of state as against the nation. The question is simply this: Who can best regulate the special interests for the public good? Most of the great corporations, and almost all of those that can be legitimately called the great predatory corporations, have interstate affiliations. Therefore, they are out of reach of effective state control, and fall of necessity within the federal jurisdiction. One of the prime objects of those among them that are grasping and greedy is to avoid any effective control, either by

states or nation; and they advocate at this time state control simply because they believe it to be the least effective. If it should prove effective, many of those now advocating it would themselves turn around and say that such control was unconstitutional.—*Theodore Roosevelt. New Nationalism. p. 96-7. From an address delivered at St. Paul, September 6, 1910.*

If child labor is to be forbidden, under our existing constitutional arrangement, it is the business of each state to do it within its own bounds. But some of the states will not do it; at any rate some of them have not done it, and this subject is very obnoxious to those who want to see child labor abolished everywhere. It is also unfair to those states which have abolished it. Child labor is employed for no other reason than that it is cheap; cheap labor means the production of cheap goods; and the factory which can produce cheap goods has an advantage over its competitors which are forbidden to employ cheap labor. If Massachusetts, therefore, forbids child labor, while South Carolina does not, this means that factories in the last named state have a substantial advantage over those of the first named in the production and sale of merchandise. Many factories, therefore, are leaving the states in which the labor laws are strict and are moving to those in which the laws favor the employment of cheap labor. This is an unfortunate situation and one which ought to be remedied. It is intolerable that a state which desires to place humane and enlightened laws on its statute book should be penalized for doing so. It is unjust that it should lose its industries because other states choose to establish lower standards and to permit the employment of children who ought to be in school. It is a disgrace to American civilization that the people of any state in the Union should tolerate the herding of young children for long hours into shops and factories. But the national Consti-

tution is in no wise to blame. The trouble goes deeper than the wording of that document. It arises from our insistence upon states' rights, upon the right of each state to regulate its own internal affairs. Many other evils have arisen from our insistence upon states' rights. Some of the states have lenient divorce laws and poor banking laws; some have poor schools, poor roads, poor courts. —*William B. Munro. Current Problems in Citizenship. p. 208-9.*

It is vain to expect uniformity of social legislation or even a satisfactory amount of cooperation from a group of independent local governments. A state legislature cannot be expected to consider the interests and opinions of any but its own constituents. It exists to legislate in their interests just as Congress exists to legislate for the nation. That some of the states pass child labor laws and others refuse, that some allow railroad corporations special privileges which others deny, that some are willing to spend much in raising the standards of public health and public education and that others are willing to spend little, that these and similar variations in policy occur is not only an inevitable but a justifiable result of confiding vital national business to governments which are responsible only to local opinions and interests. Yet the inequalities and excesses in state legislative policy no less inevitably and properly drive reformers to the national government for assistance. The states which connive at child labor, which allow the exploitation of men and women in industry, which are indifferent to the needs in an industrial democracy for social education (and some of them there will always be)—these states are injuring the efficiency, the health, and the morals not only of their own citizens but of the whole nation. In this region of social legislation the need for some uniformity of policy is indisputable. The agitation for the establishment of national standards will increase just in

proportion as public opinion is aroused to the danger of allowing human wreckage and popular unrest to gather at its existing rate of accumulation. It is, we believe, a mistake to attach to the American states the halo of a salutary provincialism. They constitute for the most part the citadels of American political abuses and social obscurantism. Because they are licensed to exercise a valuable share of discretionary sovereign power, they have been seized by the bipartisan political machine as the most lucrative source of revenue and favors, and lie helpless in its grasp.—*New Republic* (editorial). 9: 171-2. December 16, 1916.

The state must be made efficient for the work which concerns only the people of the state; and the nation for that which concerns all the people. There must remain no neutral ground to serve as a refuge for lawbreakers, and especially for lawbreakers of great wealth, who can hire the vulpine legal cunning which will teach them how to avoid both jurisdictions. It is a misfortune when the national legislature fails to do its duty in providing a national remedy, so that the only national activity is the purely negative activity of the judiciary in forbidding the states to exercise power in the premises. I do not ask for overcentralization; but I do ask that we work in a spirit of broad and far-reaching nationalism when we work for what concerns our people as a whole. We are all Americans. Our common interests are as broad as the continent. I speak to you here in Kansas exactly as I would speak in New York or Georgia, for the most vital problems are those which affect us all alike. The national government belongs to the whole American people, and where the whole American people are interested, that interest can be guarded effectively only by the national government. The betterment which we seek must be accomplished, I believe, mainly through the national government. The American people are

right in demanding that new nationalism, without which we cannot hope to deal with new problems. The new nationalism puts the national need before sectional or personal advantage. It is impatient of the utter confusion that results from local legislatures attempting to treat national issues as local issues. It is still more impatient of the impotence which springs from overdivision of governmental powers, the impotence which makes it possible for local selfishness or for legal cunning, hired by wealthy special interests, to bring national activities to a deadlock. This new nationalism regards the executive power as the steward of the public welfare. It demands of the judiciary that it shall be interested primarily in human welfare rather than in property, just as it demands that the representative body shall represent all the people rather than any one class or section of the people.—*Theodore Roosevelt. New Nationalism. p. 27-8. From an address delivered at Osawatomie, Kan., August 31, 1910.*

More power for the control of the great industrial and commercial forces of the day by the national government was the burden of the speech delivered last night by Charles W. Eliot, president of Harvard University, at the national Civic Federation dinner at the Hotel Astor. He advocated not only government control of commercial associations, in which he included alike labor union and capital, but government incorporation of corporations and a governmental divorce law. Central power, he contended, was the only one which could settle the vexed questions of the day. To do that it must have more power.

Dr. Eliot said the federal government of the United States needed new powers. It was trying to get them by a stretching process—by an extremely elastic construction of the Constitution. When a corporation had the power to work all over the country, do business in every

state in the Union, it was a commercial association. Likewise a labor union, if it had the real essence of a good one, exerting its power simultaneously all over the country, it was a commercial association. Was it to be expected that any power except that of a central government could control such associations? How could the divorce question, with a different law in every state be controlled except by the force of a national government. The divorce law should be uniform. It was the competition of states that perpetuated child labor. Nothing except the national government could control it properly. Massachusetts and New York, said Dr. Eliot, had good incorporation laws, but Maine and New Jersey did a profitable business in issuing corporation rights on easy terms. Incorporation could be properly be controlled only by the national government.

"I look forward," he continued, "to an increase of the national power. It goes against our most cherished fetish of local government, local interests, local representation. But we are desperately in need of a revision of the term 'local interests'. Seventy years ago the residents of Cambridge, where I live, got their water from wells. Now our water comes in from outside the territorial limits of Cambridge. The national government rules today a territory much smaller than New England was sixty years ago. In 1826 it took a student three weeks to get to Harvard from Central New York. Now, from the point of view of national government, the country has become very easy to manage. Local interests have become continental interests."—*New York Tribune*. December 17, 1907.





## NEGATIVE DISCUSSION

### THE CONSTITUTION AND THE NEW FEDERALISM<sup>1</sup>

A tendency has developed within a few years to increase the power of the Federal government at the expense of the state government, and in the Federal government to enhance the power of the Executive Department at the expense of both the Judicial and the Legislative Departments. A disposition has also manifested itself to ignore the canons of constitutional construction which heretofore have guided the courts of this country, and to establish a new theory which shall give to the Constitution that quality of elasticity which is the characteristic of the common law. There also appear an increasing antagonism to the courts and an attempt to create a feeling that they are anti-democratic and should be shorn of their power to nullify unconstitutional legislation. The Constitution is itself beginning to be regarded by some of our people as an antiquated document which has been outgrown, and which established a government that was democratic in name but anti-republican in fact. An antipathy is expressed to the limitations of power which the Constitution has imposed and which the fathers revered and deemed necessary. These tendencies are found to some extent in both of the great parties and in all sections of the country. The tendencies are menacing and they should be earnestly opposed and strenuously resisted. It is not surprising that, among eighty-five millions of people, theories of government should be advanced which

<sup>1</sup> By Henry Wade Rogers. *North American Review*. 188: 321-35. September, 1908.

are false, visionary and mischievous. But the expression of such views need not occasion any serious apprehension. The American people, in their final judgment, are not likely to go wrong, or to consent that reckless innovation shall proceed unchecked. The foundation principles of our institutions are not to be undermined and destroyed.

The chief difficulty the framers of the Constitution encountered was in coming to an agreement as to the powers which relate to the maintenance of the central government, which are known as structural powers. A great diversity of opinion existed as to the structure of the new government. Should representation be in proportion to the population or should it recognize equality of the states? Should Congress be composed of two houses or one? What regulation should be prescribed as to the time, place and manner of electing the members of Congress? Should the executive be one or several persons? How should the executive be chosen and for what term; and should he be eligible for re-election? Should the executive be surrounded by a council? How should the judicial department be constituted, and what should be its jurisdiction?

But less difficulty was experienced when it came to defining the functional powers of the government. The whole history and experience of the country indicated very plainly the line of partition between the powers of the states and of the national government. From the very beginning of our government, we have recognized a partition of powers. Matters of imperial concern had belonged, throughout the colonial period, to the imperial government; while matters of local concern were regulated by each colony for itself. The line of division separating these powers was not sharply defined by organic law, but it continued to exist down to the time when the Articles of Confederation were adopted.

The founders of the republic established the Consti-

tution upon the fundamental principles of the absolute autonomy of the states, except in respect to the interests common to the entire country. They realized to the full extent that upon no other principle would it be possible to maintain a republican government over a country even as large as ours then was.

Once the question was whether the states would destroy the national government. Now the question seems to be whether the national government shall be permitted to destroy the states. It was the fear that that question might sometime arise which led Samuel Adams and John Hancock in Massachusetts, George Clinton in New York and Patrick Henry in Virginia to withhold for so long their assent to the ratification of the Constitution. But, under the Constitution, the states are as indestructible as the union. The Constitution looks to an indestructible union composed of indestructible states. Actual abolition of the states is impossible. There are, however, forces in operation which seek to reduce the states to administrative departments like those of France. There is an increasing tendency to regard a state as a mere geographical expression, rather than as a political division of the country. There ought to be, in every part of our country, not only a revival of knowledge of the Constitution, but a careful study and weighing of the opinions of the fathers as they found expression in the debates in the convention which framed the Constitution, and in the conventions of the several states which ratified that instrument.

There is a constitutional and wholesome doctrine of states rights the maintenance of which is of the utmost importance to the continued welfare of the republic. In the name of states rights certain extreme and disorganizing views were at one time promulgated, which the country received with disfavor. In our day, nullification is recognized as folly and secession as a crime. But it

has been said that, because this folly and this crime were committed in the name of states rights, it would be folly to infer that the name may not have a good meaning and represent a useful thing.

If the government is to endure, the people must steadfastly maintain two essential and fundamental principles: the first is, that the national government possesses all the powers granted to it in the Constitution, either expressly or by necessary implication; and the second is, that the states possess all governmental powers not granted to the general government or reserved to the people.

We are threatened with a revival of Federalism—a Federalism that is more extreme and radical than the leaders of the old Federal party ever countenanced. The argument proceeds on the assumption that the states have failed to perform their duty properly, so that great evils have grown up which the states cannot or will not remedy, and from which we should have been free if only the Federal government had possessed the authority and not the states.

That the evils exist is conceded. That the states have not done their full duty also is conceded. But that the Federal government would have done better is a mere assumption, and one I am not prepared to accept. Congress now has in the territories and District of Columbia all the powers which the state governments possess; yet the legislation respecting the corporations which Congress has enacted has not been better than the legislation of the states on the same subject. The laws of Congress have not secured publicity of accounts, nor prevented over-capitalization and stock-watering, and an adequate system of inspection has not been established over Federal corporations. The Union Pacific Railroad, with which Congress has been concerned, had, upon its reorganization in 1897, a share capital of \$136,000,000, which at market prices was worth only \$54,000,000, showing an estimated over-capitalization of \$81,330,000. Congress has pro-

vided for the examination of the national banks. But the inspection of the national banks is not superior to the system which Massachusetts has established for the inspection of its state banks. The law of Massachusetts regulating insurance companies is as good as, and in some respects better than, that which the advocates of a Federal law endeavored to get Congress to enact a year or two ago. And about the time the President was declaring in messages to Congress that the states were incompetent to deal with the problem of insurance, the state of New York, under the guidance of its present governor, enacted an admirable piece of legislation, superior to that which a president of a New Jersey insurance company, himself a senator, was seeking to impose upon Congress, under the falacious assumption that insurance was interstate commerce, the Supreme Court of the United States to the contrary notwithstanding. During the present year, the same state, under the direction of the same governor, has enacted a public utilities law which, as a piece of constructive legislation intended to curb the public service corporations, is in advance of anything which has come from Congress respecting the corporations it has created, or over which it has control as the legislature for the territories and the District of Columbia.

That in times past state legislatures have been under the control of special interests is too true. But, unfortunately, so has Congress. One evidence of it is seen in the tariffs established from time to time. Under the pretence of protecting labor, tariffs have been fixed, not merely high enough to cover the difference in the cost of labor here and abroad, but far in excess thereof, and so high that the great mass of the people of this country have been exploited that the privileged few might build up enormous fortunes. The legislation has not been in the interest of the working man nor for the benefit of the people as a whole, but quite the reverse. Those who have been benefited by such legislation have been certain

privileged classes, the coal barons and the beef barons, the steel barons and the lumber barons, the sugar barons and tobacco barons of the country, who have been permitted by Congress to write the tariff laws of the United States.

Scandals there have been at times under state governments, and scandals likewise there have been under the Federal government. Unfortunately, scandals are likely to arise under any government; for the men who are entrusted with public office are not always of high character or distinguished for probity. But the national government has had its full share in the shame and disgrace occasioned by those who have betrayed their public trusts. Some years ago, Senator Hoar of Massachusetts, speaking in the Senate of the United States of a work authorized by Congress, said:

When the greatest railroad of the world, binding together the continent and uniting the two great seas that wash our shores, was finished, I have seen our national triumph and exultation turned to bitterness and shame by the unanimous reports of three committees of Congress—two of the House and one here—that every step of that mighty enterprise had been taken in fraud.

The fraud and corruption which have attended upon our dealings with the Indians extend through a century of dishonor. The memory of the *Crédit Mobilier*, of the Whiskey Ring and of the Star Route Ring has not faded out of mind. The revelation made a short time ago as to the corruption which existed in the Post-office Department and in the Agricultural Department are fresh in the public recollection, as are the frauds connected with the administration of the public lands. But recently, the President suspended the Public Printer on charges of maladministration.

The tendency to take their domestic affairs from the control of the state is shown by the agitation in favor of a national incorporation law. It is assumed that the power to regulate commerce includes the right to regulate the corporation which is engaged in commerce. But if, under its power to regulate commerce, Congress can as-



sume control over all corporations which engage in interstate commerce, it is difficult to see why it has not an equal right to assume a like control over all partnerships that do any interstate business, as well as over all individuals whose business is of a similar nature. In this way, Congress can take to itself jurisdiction over a very large part of the business of the country, withdrawing from the control of the states what always has been supposed to be within their peculiar province, and working a fundamental change in the character of the government itself. It may be very seriously questioned whether the mere fact that a corporation or a partnership is engaged in interstate commerce affords any sound legal reason for assuming that Congress has the right to exercise an exclusive jurisdiction over every such corporation and partnership or individual who engages in interstate commerce, even though the interstate commerce may be but a part of the business of such corporation or partnership, as they may be likewise engaged in intrastate commerce. So that if the regulation of corporations is a regulation of interstate commerce it may be a regulation of intrastate commerce as well.

If Congress has jurisdiction over every corporation which to any extent engages in interstate commerce, what is there to prevent Congress from declaring that the vast properties which these corporations control shall not be taxed by the state governments without the consent of Congress? The states cannot tax national banks except to the extent authorized by the national banking law. If all corporations engaged in interstate commerce are to be compelled to incorporate under a national incorporation law, why may not Congress prohibit the states from taxing such corporations or the properties which they own? It is nothing to the purpose to say that Congress would never exercise the power. The fact that it could exercise the power, and might sometime do so to a greater or less extent, is one not lightly to be lost sight of, as these



corporations own a very large proportion of the wealth of the country, the withdrawal of which from the taxing power of the states would be most mischievous, crippling the resources of the states and imposing new burdens of taxation on the individual citizen.

The disposition to extend the power of Congress beyond its constitutional limits and unduly to diminish the proper legislative authority of the states is farther exemplified in the passage by Congress in 1906 of the Employers' Liability Act. Congress assumed that, under its power to regulate commerce, it could pass the act and apply it to all employees of common carriers engaged in interstate commerce, even though such employees rendered no service in the transportation of interstate commerce, such as engineers of local trains, section hands, mechanics in car and machine shops and clerks in offices. The Supreme Court in the employers' liability cases declared the law unconstitutional and denied the contention of the Attorney-General that where one engages in interstate commerce one thereby comes under the power of Congress as to all his business and may not complain of any regulation which Congress may choose to adopt.

The extreme to which advocates of the new federalism go is shown in the proposal to enact the Beveridge child labor law and make it applicable throughout the United States. The Supreme Court has decided that the power to regulate commerce does not confer power to regulate manufactures, as commerce and manufactures are not synonymous. But the advocates of the bill asserted that the government has the power to shut out from interstate business any article manufactured in violation of the act. To assume that Congress can do this is to assume that it can regulate the hours of labor, the wages paid and prices charged by any factory in the United States for goods which are to find their way into interstate commerce. To assume that the Congress has any such power is to assume that American statesmen

and American lawyers for a hundred and twenty years have not understood the Constitution of this country aright.

The excuse made for bringing a bill of this kind before Congress was that the states had not discharged their full duty in the matter. But if half of the states have not enacted a child labor law, they are no more delinquent than Congress. No one questions that Congress has a constitutional right to make such a law applicable to the District of Columbia and for the territories. It has, however, never done so, and the same condemnation which its advocates pronounce upon the states which have failed to enact such laws is as applicable to the Congress for a similar neglect within the limits of its unquestioned jurisdiction. Undoubtedly, there should be such a law in each state, and one already exists in a majority of the states.

Until recently, it had always been supposed that the Federal government had no possessive title to the water flowing in navigable streams, nor to the lands composing their beds and shores. It had not been thought that Congress could grant any absolute authority to any one to use and occupy such water and land for manufacturing and industrial purposes. The theory has been that the Federal government controlled navigable streams for the single purpose of preventing obstruction to navigation. The states have granted the use of these streams for power or irrigation purposes, and their action has always been understood to be subject to be reviewed by the Congress, but only to the extent of determining whether that which the states had authorized would constitute an interference with commerce. Now, apparently unmindful of an impressive line of decisions of the courts which assert the doctrine that the waters of a river and the waters of the arms of the sea belong to the states and not to the Federal government, the President recently sent a message to the Congress asserting a right in the general government to exact tolls for the use of the waters in

navigable streams, and of his intention to veto all bills granting water-power rights which do not authorize the President or the secretary concerned to collect such tolls as he may find to be just and reasonable. A republican senator properly characterized the doctrine as "the most far-reaching and over-reaching claim of power that ever was made in a government." And he added: "The kings and emperors claim no such rights in their lands."

The President of the United States has made known on various occasions his conviction that what the country needs is "through executive action, through legislation and through judicial interpretation and construction, to increase the power of the Federal government." His distinguished Secretary of State, one of the most eminent members of the American Bar, whose ability and patriotism no man calls in question, agrees with him. In one of his speeches, Mr. Secretary Root has said:

It is useless for the advocates of State rights to inveigh against the supremacy of the constitutional laws of the United States or against the extension of national authority in the fields of necessary control, when the States themselves fail in the performance of their duty. The instinct for self-government among the people of the United States is too strong to permit them long to refute any one's right to exercise a power which he fails to exercise. The governmental control which they deem just and necessary they will have. It may be that such control would be better exercised in particular instances by the government of the States, but the people will have the control they need either from the States or from the National Government, and if the States fail to furnish it in due measure, sooner or later constructions of the Constitution will be found to vest the power where it will be exercised in the National Government.

In other words, centralization of power in the nation is to be accomplished not by amendment of the Constitution depriving states of the rights which now are theirs under the Constitution, but they are to be deprived of those rights by construction and interpretation. The revolutionary character of these utterances will be better understood if they are read in the light of the principles laid down by the leading authority on American Law. In his great

work on *Constitutional Limitations*, Mr. Justice Cooley says:

A Constitution is not to be made to mean one thing at one time, and another at some subsequent time when the circumstances may have so changed as perhaps to make a different rule in the case seem desirable. . . . A Court or Legislature which should allow a change in public sentiment to influence it in giving to a written Constitution a construction not warranted by the intention of its founders, would be justly chargeable with reckless disregard of official oath and public duty. . . . What a Court is to do, therefore, is to declare the law as written, leaving it to the people themselves to make such changes as new circumstances require. The meaning of the Constitution is fixed when it is adopted, and it is not different at any subsequent time when a Court has occasion to pass upon it.

Another distinguished commentator on the Constitution, Mr. Tucker, says:

The idea that usurpation, or necessity, or a supposed extension as the consequence of custom or progress of society, can make jural any power not constitutionally conferred is contrary to American political science, fatal to the liberties of the people and is only a wicked pretext for the violation of sworn obligations. Such an idea would really mean this—that persistent usurpation of power by a Government, acting under the prescribed limitations of a written Constitution, could amend and change that Constitution, which by its terms can only be amended by the body politic itself. It would make the Government a self-creator of its own powers, instead of the creator of the body politic with only delegated powers. It would take sovereignty from the people and vest it in the Government; and transfer all political authority by flagrant usurpation from the body politic to the omnipotent Government. Written Constitutions would be destroyed, and the self-usurped omnipotence of irresponsible government would be enacted upon their ruins.

This, it should be needless to say, is the doctrine of the Supreme Court. That court has lately said:

The Constitution is a written instrument; as such, its meaning does not alter. That which it meant when adopted, it means now. . . . Those things which are written within its grant of power, as those grants were understood when made, are still within them; and those things not within them remain still excluded. . . . As long as it continues to exist in its present form, it speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers.

To be told by men in high authority that the Constitution is to be changed by construction and interpretation, so that it shall mean something different from what it says and from what it has always been understood to mean, and from what it was intended to mean by those who framed and adopted it, is evidence of an extraordinary disregard of the accepted principles of courts and commentators.

The proposal to discard the idea that the Constitution always means the same thing, and to adopt the theory that the courts shall by construction make it mean what the people want it to mean or what the exigencies of the occasion may seem to require it to mean, is in effect to propose that the Supreme Court shall have the power, by a vote of five to four, to amend the instrument according to their views of what it is desirable it should mean. This power the courts are to have in order to give elasticity to the Constitution. The Constitution points out the method by which the people are to amend it when, in their judgment, it needs amendment. But, as the people have not made much use of the amending power, it is concluded that instead of requiring a change in the Constitution to be ratified by the legislatures of three-fourths of the several states, as the framers provided, it will be much the simpler and easier way just to permit the Supreme Court to make the change by construction, even though it be by a five to four vote, so construing the words used in the instrument as to give them, not the meaning which those who framed and adopted the instrument meant them to have, but the meaning which the majority of the court may think that the people at that particular time most approve. To secure the approval of five of the judges of the Supreme Court may be less troublesome than to secure the approval of the legislatures of thirty-four states. But any theory of construction which makes the Constitution mean what a majority of the people think at a given time it should mean, is

certainly not in accordance with the law and the prophets. A Federal judge of an inferior court, in a paper read before the American Bar Association at Portland in August last, argued in support of this new theory. But, as Mr. Justice Harlan of the Supreme Court of the United States has said, those who hold to this theory are, "happily, few in number." Continuing, Justice Harlan declared that "such theories of constitutional construction find no support in judicial decisions or in sound reason, least of all in the final judgments of that tribunal whose greatest function is to declare the meaning and the scope of the fundamental law."

In weighing the arguments for national as against state control, it may be well to remember that a minority of the people not only may elect, but since 1856 more frequently have elected, the President. In the states, on the other hand, the governors are more generally chosen by a majority vote of the electors. Including 1856, there have been thirteen Presidential elections, and in only six out of thirteen did the successful candidate secure a majority of the popular vote. On the other hand, during the same period the state of New York has held thirty-five gubernatorial elections, and the successful candidate obtained a majority of votes in all but five of them. Under our system, it has not only happened that during the past fifty years the President has generally been chosen by a minority of the people, but that the minority party has in some instances gained the House of Representatives and by a large majority. For example, in 1860 the Republican Party elected its candidate for President although he had but 40 per cent of the popular vote, and at the same time it elected 60 per cent of the members chosen to the House. In 1892, the Democratic Party elected its candidate for President although he had but 45 per cent of the popular vote, and at the same time it elected 62 per cent of the members of the House. And it has happened, as in 1876, that one party elected the



President and the other carried the House of Representatives. It is a fact, therefore, that under our system of elections the President and Congress are not as liable to represent the majority of the people of the entire country as are the governors and legislators of the states to represent the majority of the voters of their respective states.

The people of the United States cannot possibly act with the same promptness and directness as are possible to the people of a single state. It takes longer for public opinion to form and make itself felt among eighty-five millions of people, scattered over a continent and having interests widely dissimilar, than in a single state where the people are more closely associated and where their interests are less divergent. The ease with which a state constitution may be amended and the difficulty which has been found to exist in amending the Constitution of the United States afford instructive illustration upon the point under consideration. The smaller the unit of government, the more prompt, direct and intelligent its action is likely to be.

Congress might enact legislation which may be injurious to particular sections of the country without responsibility to the states affected. An act may be passed which is harmful to the interests of New York, and which its representatives in the Senate and the House unanimously oppose, and the people of the state are absolutely remediless. If the same act had been passed by the legislature of the state, those responsible for it could be turned out of power at the next election and the law repealed by their successors. But the senators from Idaho and California owe no responsibility to any other legislature than their own, and the representatives in Congress from Texas are accountable only to the people of Texas. For this reason it is of the utmost importance that the powers of Congress should be restricted to matters which affect all parts of the country



alike. It should not be possible for other states to govern say, New York, except in those matters which are essential to the common welfare of all the states.

The American people, in their desire to remedy existing abuses and to avert the dangers which menace them, should not revolutionize the governments which the fathers established. The rights of the states, as well as the rights of the nation, must be preserved.

The time is opportune to recall the opinion expressed by Mr. Justice Miller in his *Lectures on the Constitution*. That great judge said:

While the pendulum of public opinion has swung with much force away from the extreme point of the State's rights doctrine, there may be danger of its reaching an extreme point on the other side. In my opinion, the just and equal observance of the rights of the States and of the General Government, as defined by the present Constitution, is as necessary to the permanent prosperity of our country, and to its existence for another century, as it has been for the one whose close we are now celebrating.

Speaking of states rights, Mr. Webster declared:

It is this balance between the General and State Governments which has preserved the country in unexampled prosperity for fifty years; and the destruction of this just balance will be the destruction of our Government. What I believe to be the doctrine of State rights I hold as firmly as any man. . . . I say again that the upholding of State rights, on the one hand, and of the just powers of Congress on the other, is indispensable to the preservation of our free republican government.

A few years after the Civil War ended, Mr. Beecher, speaking for national unity, emphasized the importance of maintaining the rights of the states, and of the local governments of the states. He said:

New England, from her earliest Colonial days, with a fervor and intensity that have never been surpassed, preserved inviolate the one political doctrine which will enable this vast nation, if anything will enable it, to maintain Federal unity; and that doctrine is the rights of States. . . . This simple doctrine of State rights, not State sovereignty, will carry good government with it through all the continent. No central government could have sympathy and wise administrative adaptation to local peculiarities of this huge nation, couched down between two oceans, whose southern line never freezes and whose northern boundary never melts.

And Mr. Justice Harlan in December last expressed the opinion that "The American people are more determined than at any time in their history to maintain both national and states rights, as those rights exist under the union ordained by the Constitution." He added that if the trend in public affairs today is toward the centralization of governmental power in the nation and the destruction of the rights of the states, it would be the duty of every American to resist such a tendency by every means in his power. He thought that a national government for national affairs, and state governments for state affairs, is the foundation rock upon which our institutions rest, and that any serious departure from that principle would bring disaster upon the American people and upon the American system of free government.

The writers on political institutions have pointed out many times the advantages of local government over centralized government. They have taught us that local self-government develops an energetic citizenship, and centralization an enervated one; that local self-government is conducive to the steady progress of society, and that centralization involves conditions which are unsound and do not make for the progress of society; that under local self-government officials exist for the benefit of the people, and that under centralization the people exist for the benefit of the officials; the local self-government provides for the political education of the people, and that centralization, based upon the principle that everything is to be done for the people rather than by the people, creates a spirit of dependence which dwarfs the intellectual and moral faculties and incapacitates for citizenship; that local self-government exerts an influence which invigorates, and centralization an influence which blights; that the basis of local self-government is confidence in the people, while the fundamental idea of centralization is distrust of the people; that local self-government fixes responsibility for wrongs and renders a redress for grievances practicable; that no re-

sponsibility anywhere exists under a system of centralization and that redress is difficult to obtain for acts of commission or omission; that under local self-government every individual has a part to perform and a duty to discharge in public affairs, while under a centralized government one's affairs are managed by others.

The noblest system of political institutions the world has known, and the most conducive to the happiness and welfare of mankind, is that of local self-government. It has been said that "to centralize is the act and trick of despots, to decentralize is the necessary wisdom of those who love good government."

The preservation to the local community of the right to manage its own affairs must be recognized as essential to the permanent well-being of the republic.

Local self-government has been described by a political philosopher as that "system of government under which the greatest number of minds, knowing the most, and having the fullest opportunities of knowing it, about the special matter in hand, and having the greatest interest in its well-working, have the management of it, or control over it." Centralization has been described as that "system of government under which the smallest number of minds, or those knowing the least, and having the fewest opportunities of knowing it, about the special matter in hand, and having the smallest interest in its well-working, have the management of it, or control over it."

An immense amount of wretched misgovernment might have been avoided, according to John Fiske, if all legislators and all voters had those two wholesome maxims engraven upon their minds.

## FEDERAL USURPATIONS<sup>1</sup>

All governments, whether free or not, which have existed and fallen have fallen by weight of political

<sup>1</sup> By John Sharp Williams. *Annals of the American Academy of Political and Social Science*. 32: 183-211. July, 1908.

machinery. There has come a time in their histories when government and its machinery was the first consideration, and man and his individuality—the support of government—the second. It is well always to keep in mind the primal fact that while government is necessary and ought to be made good, it is yet, after all, a necessary evil growing out of the vices of human nature. It is a means to an end, which end is the happiness and freedom and development of the individual man and woman; and is never an end in itself.

This idea was carried further in the formation of our Federal government than in that of any other government. In a certain sense indeed the Federal government is not the government of these United States at all, but is a piece of central machinery organized to hold together in union the several governments of the several United States and protect them by union from mutual aggression and from aggression by foreign powers. Federal usurpation of power is not a recent growth. It was a necessary concomitant of the rule of the old federalists. Hamilton and men of his way of thinking, delegates to the constitutional convention, strained every effort to procure a stronger, or as they would have said, a more stable government than that which was as a matter of fact reported to the people for adoption in the original Constitution. Though defeated in the convention in many of their essential purposes it was but natural that when the Constitution was submitted to the peoples of the respective states, that they should have become the most strenuous advocates of its adoption, because though giving birth to the government not so strong nor so centralized as they desired, it still inaugurated one very much more to their liking than the old confederation. They soon found that the objections to its adoption were not based on its being too weak a bond of union, but were precisely the contrary. They therefore necessarily based their advocacy upon the plea that it did not inter-

fere with the real rights and sovereignty of the states, within their spheres; that the states would still have such rights as were not delegated expressly or by proper implication, and in their advocacy they emphasized how little authority and power, comparatively, the new Federal government would have. Notwithstanding this fact, the discontent with the Constitution as it came from the hands of its framers was so great, upon the ground that it did not sufficiently safeguard the inalienable or natural rights of the individual and the reserved rights of the states, that it was adopted only upon the understanding that the first ten amendments should be added to it. They were immediately added after the adoption of the original instrument.

If you will dispassionately take up our fundamental law and study it without the first ten amendments, you will see that it would have launched into existence the least democratic of all governments now existing among English-speaking peoples. As originally framed, there was no express guarantee of the freedom of the press, freedom of speech, freedom of assembly, trial by jury or habeas corpus—in fact, most of the muniments that had been secured by war and legislation to the race before it crossed the Atlantic were unprotected, whether these muniments had been embodied in the habeas corpus act, in the bill of rights, or in some other instrument.

George Washington was not really a member of any political party. He had the idea that government with free institutions could be carried on without parties, and deplored their existance as factional. At the beginning of his administration this idea was his guide. Later on, after Jefferson had retired from the cabinet, and Hamilton became unrestrained adviser, the administration did take on a somewhat federalistic hue. When John Adams came in, with the real federalists in supreme power and full control, then the note of federalism in the shape of

Federal usurpation of power began to assert itself. The great usurpation of Federal authority in the alien and sedition laws was an illustration of the legislative and executive side of the government. When Adams was retired, he left the bench in control of federalist judges, the greatest, most ingenious, as well as perhaps the most sincere of them all being John Marshall. The Dartmouth College case, in my opinion the Illiad of all our woes, in so far as our inability properly to control corporations is concerned, and in so far as judicial construction has brought about Federal usurpation, naturally followed. The decision giving the right to the Federal government to establish and maintain a national bank, for which no authority could be found in the organic instrument, except by fiction of law, was another result of a Federal judge's attempting to construe into it something sought in the convention to be embodied and the granting of which had been refused.

Every governmental abuse is based upon some plea or pretext, and the usurpation of power by government is generally based upon "necessity," the "tyrant's plea." This real or fancied necessity generally grows out of war. This has been especially true with regard to legislative and executive usurpations by our Federal government.

Amid the universal plaudits which he has received and deserved there are few people left ungracious enough to give sufficient emphasis to the part which Abraham Lincoln and his cabinet had in changing the spirit, if not the form, of the American government. The doctrine of "war powers" came into being, and after war had passed and peace had come the usurpations following from the exercise of the so-called war powers furnished precedents for their continuance and for other usurpations like them. It has always been said *inter arma leges silent*, there are undoubtedly certain powers which have been recognized to belong to all governments



while forces are operating in the field and in the enemy's country beyond those which are conceded to the same governments at peace and at home.

During the war between the states the executive first asserted and Congress afterward attempted to confer upon the executive the right to suspend the privilege of the writ of *habeas corpus* not only in the territory which was within the boundaries of the confederacy, but within the states which had remained faithful to the union, and which did not constitute a field of war. Things went so far that the privilege of the writ of *habeas corpus* was suspended on the order of a lieutenant-general acting under general authority of the President. This in spite of the words of the Constitution upon the subject and the uniform dicta of text books and decisions of courts.

The Secretary of War and the Secretary of State on bare orders based upon no affidavit even, much less indictment, arrested and confined men within the loyal states and spirited them off to prison. Federal marshals and police did the same thing. All this, too, prior to the act of March 3, 1863, whereby Congress attempted to confer upon the President the power and the right to suspend the writ of *habeas corpus*, a power vested by the Constitution according to all judicial construction in Congress alone.

Men were convicted of murder and treason without a jury trial. Under a proclamation of the President among the classes to be thus treated were those who "magnified the resources of the enemy," those "inflaming party spirit among ourselves." It seems almost incredible now to believe that men could have been taken out of their beds at night and carried away to prison, without even affidavits, by ignorant marshals who determined for themselves the question whether or not those seized and imprisoned were guilty of disloyalty, especially when disloyalty was defined in such vague



terms as "magnifying the resources of the enemy," "underrating our own," or "inflaming party spirit among ourselves."

In December, 1866, in the case of *ex parte Milligan*,<sup>1</sup> the Supreme Court pronounced the proclamations of the President unconstitutional and the act of Congress so, except when "confined to the locality of actual war," and not elsewhere, and to places "where the courts are not open."

There are those who believe that the branch of the government most guilty in the field of Federal usurpation is the judiciary. This is not true. Upon the whole the courts have been a bulwark of protection for the natural rights of the individual and the reserved rights of the states. Judicial usurpations, which have been successfully accomplished have not been a tithe of those which have been unsuccessfully attempted by the Federal legislature and the Federal executive. The Ku Klux act which would have carried the Federal authority into every man's home within the states in the enforcement of criminal law, the civil rights act, which usurped to the general government nearly all of the police powers of a state, and the control of the social affairs of the citizen, are illustrations of attempted Federal usurpations set aside by the court.

During the period immediately after the war between the states Congress fought most viciously against the courts, frequently taking away from them jurisdiction on the subject matter, or attempting by acts of Congress, and sometimes successfully to prevent appeals to the Supreme Court of the United States. A book might be written, and a very interesting one too, upon usurpations flowing out of the Civil War and out of the supposed "necessities" of a reconstruction of the southern states. Some of the usurpations that owe their real existence to the Civil War still remain to plague us, for

<sup>1</sup> 4 Wallace 2.

example, the legal tender case. The Constitution deprived the states of the power to emit letters of credit and issue paper currency, a power which was inherent in their sovereignty, but which had been found to be greatly abused. Hamilton himself contended that not only was this power not granted to the Federal government, but that in spirit it was prohibited to it. Nobody ever did or does now doubt the right of the government to issue a note as evidence of indebtedness when it has not the money wherewith to pay. But nobody up to the Civil War had ever, for one moment, dreamed that the government had a right to levy a forced loan upon the people by making its notes a legal tender for the payment of debt. This legacy is not justly attributable to the judiciary, but to the President and the Senate.

You are familiar with the manner in which this result was arrived at. After a first decision by the court declaring the legal tender act unconstitutional, the addition of a new judge to the number on the bench and the appointment of another judge to fill a vacancy on the old bench caused by death accomplished a reversal. It requires no imagination, but a plain view of the field only, to realize what an immense capitalistic and centralizing influence the judicial construction into the Constitution of this power which was never granted, to wit, the power to make of government notes a legal tender to take the place of gold and silver has vested in the Federal government.

John Marshall in the case of *McCullough* against Maryland had early in the history of the country upheld the power of the Federal government to charter a national bank of issue, although a proposition in the constitutional convention to confer such power had been expressly offered and expressly voted down. The opinion in the case upheld the bank as a "fiscal agency" of the government, and as such it was declared that it could not be taxed by a state, because such power of taxation

would carry with it to one sovereignty the power to destroy the fiscal agencies of another. And yet long afterward when the law to establish the present national banking system in order to strengthen the credit of the government and increase the price of its bonds, carried a provision to tax note issues by state banks 10 per cent (it being admitted that this tax was levied not for the purpose of revenue, but for the purpose of stamping state bank issues out of existence), the court cavalierly flung aside the doctrine that one sovereignty could not tax out of existence the chartered instrumentalities of another, and held, in substance, when it sustained the constitutionality of the 10 per cent tax, that it could. The power to issue "money" directly in the shape of legal tender treasury notes, the power to confine the function of bank note issuance to national banks and to monopolize their regulation have together given to the Federal government that power and influence over finance and business which makes other usurpations, whenever all three branches of the Federal government are desirous of them, irresistible by the states or by the people thereof.

The early assertion by Congress of the power to levy import duties not simply as taxes for raising revenue, but for the admitted purpose of hothousing into prosperity at the common expense such industries as in the opinion of Congress it is for the common interest and general welfare to hothouse, has given a whip handle, if not a mastery, over the manufacturing interests of the country to the Federal government. The usurped control of finance and of manufactures, together with the immense powers actually vested by the Constitution itself in the Federal government, under the treaty clause and under the interstate commerce clause, have made a government stronger than any that Hamilton and his compeers ever dared attempt to inaugurate in the constitutional convention—stronger than any that

Marshall ever dreamed of construing, or wanted to construe, into existence.

This is true when you consider the real power of Congress under the interstate commerce clause, when it is exercised honestly and genuinely for the sole constitutional purpose of the regulation of interstate commerce. When you consider that this power has been abused as a means to accomplish ends not contemplated by it, this conclusion is stronger. Consider the full effect of the lottery cases and the oleomargarine cases carried out to their logical results as precedents for future legislation and judicial decisions.

What has been actually accomplished by legislation regulating, or pretending to regulate, interstate commerce, is as nothing compared with what is proposed. A brilliant young senator from Indiana proposes to control child labor within the state through the interstate commerce clause by denying to products manufactured within a state interstate passage, when produced by child labor, though employed in accordance with the laws of the state of their manufacture. If Congress has power to do this it has power also to say that no products shall be carried in interstate commerce, if produced where labor is employed for longer than eight hours a day. If it has a right to do either, it has a right to say that no man or woman shall travel upon an interstate ticket who has been divorced according to state divorce laws which do not meet with the approbation of Congress.

Early in the history of the country the House of Representatives sent to the Senate a bill to regulate and work certain copper mines in New Jersey—I believe it was, if my recollection is correct—and Mr. Jefferson, in his playful but philosophical manner, said that their method of deriving this power from the Constitution was about this: "Congress has a right to provide for the common defense; ships are necessary for the common defense; copper is necessary to finish ships; mines

are necessary to be worked in order to get copper, and, therefore, Congress has a right to work mines within the states," and he added that anybody who had ever followed the reasoning in "The House that Jack Built" could readily understand and be convinced by the force of the argument.

We are told now that water is necessary for interstate commerce; that erosion of hillsides and mountains fills up the water courses; that deforestation leads to erosion; that reforestation will stop erosion, and that, therefore, under the interstate commerce clause, Congress has a right to enter into the states, with or without their consent, buy up all the mountain sides, and turn them into public forests, an argument probably logical, but very attenuated.

By parity of reasoning Congress might enact a force bill under the interstate commerce clause basing it upon the right of Congress to say what should or should not enter into interstate commerce as freight or as passengers. It might, therefore, say that any man elected to Congress, unless elected in accordance with a certain law passed by Congress, should not be permitted to travel in interstate commerce, and therefore should not be permitted to leave his state and come to Washington to take his seat as a representative. I know, of course, that the *reductio ad absurdum* is not the safest of argument, but it sometimes makes things ridiculously clear.

Add to all this power over finance, banking, commerce, manufacture, the immense spread of the activities of the Department of Agriculture. It is furnishing seed to the farmers, it has established a stock farm in one of the states for the purpose of breeding "a standard national horse," and the right of entering into a state, with or without its consent, and constructing roads not only between the states but within the states is being almost asserted. With construction will come

the assertion of the right to control, if not to police such roads.

The undoubted right of Congress so to regulate interstate commerce as to stop the spread of disease among men, animals or plants is being driven to its utmost, and will be driven beyond its utmost, legitimate application. That the operations of the great Department of Agriculture are beneficent there can be no doubt. The few millions appropriated each year for that department accomplish more good than ten times as many millions appropriated for other purposes. But it does not follow that because a given work is wise and beneficent that the Federal government has the right, or ought even by amendment to be given the right to do it, nor does it follow that because the Federal government does beneficently carry it on that it could not have been carried on quite as beneficently by the states, if the Federal government had stayed out of the business. In connection with agriculture, for example, I, for one, believe that if the Federal government had never undertaken to do anything at all with it the general condition of agriculture in the country would yet have been quite as good as it is, perhaps better, because then the states would have established magnificent agricultural departments with experimental stations, training schools and all that; would have vied with one another from New York to California in doing the work, each actuated by the motive of excelling others in the prosperity brought by improving the basic art. The department wants the Federal government to go further and to inaugurate and maintain in the state technical, agricultural and manual training schools, with what measure of Federal control it has not thus far seen fit to indicate.

Take as the next illustration the gradual assumption of power to the Federal government in connection with works of irrigation. That Congress has a right to ir-



rigate the public lands so as to make them valuable, and enable them to be sold so that the money thus placed in the treasury as the proceeds of otherwise worthless lands may inure to the interests of all the people, there can be no doubt. Growing out of this right Congress has taken hold of the work of irrigation everywhere on private lands as well as on public domain. It has added to that the kindred subject of drainage, because undoubtedly if Congress has power to put water on lands outside of the public domain it has an equal power to take water off of lands outside of the public domain. The departmental work does not seem to have received even a momentary check from the decision of the Supreme Court in the great case of *Kansas against Colorado*, in 206 U.S., where the court says that "no one of them" (to wit, the enumerated grants of power and authority to Congress in the Constitution) "by implication refers to reclamation of arid lands."

In some cases where Congress has usurped power and where the courts have subsequently set aside the acts of Congress as unconstitutional the wrongs perpetrated under the act have been perpetuated. The captured and abandoned property act is an instance in point. After the general amnesty proclamation of the President it became evident that the money lying in the treasury from the sale of captured and abandoned property would have to be restored to the southern people who had owned it. A rider on an appropriation bill of July 12, 1870, undertook to annul, and Congress, by refusing to appropriate the money out of the treasury practically has annulled the subsequent decisions of the court upon this subject. Millions of dollars are now lying in the treasury accumulated there under this act of Congress which the court subsequently held to be a special fund owned by the owners of the property. There is no way of getting it out however, because, as the court properly says, it requires an act of Congress to appropriate



money once covered into the treasury. Here is a case where Federal legislation has been adjudged invalid and unconstitutional, and yet where the people injured by the usurpation have suffered the effect of it, until they died, and their heirs or assigns are suffering the deprivation yet. The money in the treasury derived from the cotton tax and still kept there is another instance in point.

I have referred to the war between the states as a source of much Federal usurpation. The Spanish-American War might be referred to in the same connection. The Constitution of the United States provides for the separation of the judicial, executive and legislative functions. In the Panama zone, the executive alone has been and is exercising not only executive but judicial and legislative functions. When a resolution was introduced into Congress, and passed by it, asking under what authority of law the President was doing this, the answer came that it was under authority of certain acts of Congress, their dates being recited, and under a treaty with the so-called Republic of Panama, as if either an act of Congress or a treaty could confer upon the executive the right to exercise judicial or legislative powers, in the teeth of an express constitutional prohibition of their consolidation.

Our experiments with schemes of crown colonialism in the Philippines now, and for a while in Porto Rico, were so stupendously alien to the spirit of all of our institutions as to be at once horrible and amusing. Department law clerks sent out as proconsuls are learning in the Philippines and in Cuba today lessons which will return to plague the republic at home. You need not expect that what is learned there will be forgotten here. In Rome the Imperator was first a field officer in Gaul or Asia—in the enemy's country or in conquered countries. Then there came the exercise of powers as Imperator in Rome itself. Marius and Sulla, as well as Julius

Cæsar, were virtually emperors long before Augustus Cæsar had founded what we now call the Roman Empire.

Peace is important to all peoples. I sometimes think that two-thirds of the energies of all the statesmanship in the world might be profitably employed in the maintenance of peace throughout the world. But, if important to other peoples, it is doubly so to us with our peculiar dual government, the balance of which is so nicely adjusted and so vital, and which is always shaken by the *sequelae* of war. We never know beforehand what these *sequelae* are going to be. You hear much of "the horrors of war." The greatest of all these horrors is the murder of local self-government, the only possible field of development for individual manhood.

The spirit of crown colonialism will be found to be contagious. Accustomed to it in all its spirit in our daily administration of colonial affairs, the public will gradually become accustomed to the insidious introduction of its features at home. No free government can successfully control alien and unassimilable peoples except by the violation of the fundamental principles of free government itself. Our forefathers recognized this when they placed the Indian tribes on a footing with foreigners, to be dealt with by treaty. The mailed fist, well exercised to its task, is dangerous ultimately to liberty of citizens much more than it is even to subject peoples. The system will some day drag down England herself to the exhaustion of her sons and her revenues in maintaining her hold upon India. The inauguration of the system by us in the Philippine Islands, unless once we have the good sense to put the people of the archipelago upon their own feet, teach them to stand alone and leave them standing afterward, will have the same effect on us in the long run. The Philippines are even now furnishing the excuse of great armaments, naval and military, and they constitute today the one point of unnecessary and unnatural contact out of which great wars may, if not must, ensue.

These Federal usurpations are going on not only through the executive, and the legislative, but—insidiously, gradually, unmarked—they are going on through the administrative branches of the government. Charles I lost his head, and James II his throne, because of executive and administrative suspensions of acts of Parliament. The American people have become so accustomed to the suspension of laws by mere non-enforcement by the executive, or some obscure bureaucrat under the executive, that you perhaps could not excite real alarm in the minds of five men by a full recital of them all.

Mr. Shaw, while Secretary of the Treasury, took money already covered into the treasury, and under the guise of depositing it virtually loaned it to such banks as he chose without interest. This, notwithstanding Article I, Section 9, Clause 7, of the Constitution, which reads: "No money shall be drawn from the treasury, but in consequence of appropriations made by law." The same Secretary of the Treasury quietly construed the disjunctive "or" in a law passed by the Congress to have the meaning of the conjunctive "and," so that when Congress had by law said that those receiving deposits of public money—not deposits of money already covered into the treasury, remember—but deposits of money collected from internal revenue and not yet covered into the treasury—should deposit as security United States bonds "and" other bonds, that it means "or" other bonds. Upon this he quietly issued a ukase to the effect that he would receive such securities as complied with the savings banks laws of New York and Massachusetts, and would dispense with the deposit of United States bonds altogether in his discretion.

The discussions in Congress at the time that the law under whose alleged authority he acted was passed show the reasons for the original act. People forget now that there was a time when United States bonds were not at par. It was wise, therefore, upon the part of Congress

to provide that the secretary might require other security as *additional* to that of national bonds in order that the security might always be equal in par value to the money loaned. I need not dwell upon the total torturing of the original meaning by the secretary's decision. Secretary Cortelyou ruled later on that under the provisions of a law permitting the issuance of treasury certificates "when necessary to meet public expenditures," he was enabled to issue certificates to get money in order to help the banks by free loans in a panic.

An administrative board of the United States, engaged in the business apparently of seeing that due "protection" is rendered to "American industries," and finding that there was no tariff on frog legs which were being imported into our territory, to the detriment of the great "American industry" of bullfrog raising, gravely ruled that they were taxable under the provision which put an import duty upon dressed poultry.

What has been accomplished in the way of Federal usurpation by the national legislature and executive, and set aside by judicial authority, or left to stand and stay to plague us yet, does not constitute a tithe of what we are to expect, if some recent utterances by great and popular men are to be taken at their face value.

The President, in his Harrisburg speech, delivered in the month of October, 1906, says: "In some cases this governmental action must be exercised by the states. In others it has become increasingly evident that no sufficient state action is possible and that we *need* through *executive action*, through legislation and through *judicial interpretation and construction*, to *increase* the power of the Federal government. If we fail *thus to increase it* we show our impotency."

Mark the language. "We need"—that is the old familiar tyrant's plea of necessity—to do what? To increase the power of the Federal government. The very verb "increase" is the President's word, and is a confession

that the Federal government does not now possess the powers desired to be annexed—a confession of deliberately contemplated usurpation. And to do it how? Not by amending the Constitution, even though we had to amend the amendatory clause in order to make the work of amendment easier. But by “executive action,” by “legislation,” both of them necessarily, if there be an *increase* of power, violative of the constitutional limitations upon executive action, and upon Federal legislation. It cannot be too often repeated that this is true, or else the word “increase” would not have needed to be used. And third, and more insidiously still, “through judicial interpretation and construction”—by the soul of all insidious revolution! Mark the words well in your memories.

Secretary Root, in his New York speech in December, 1906, evidently following up a deliberately laid scheme by supplementing the President’s speech in Harrisburg in October of that year, uses this language: “Sooner or later constructions *will be found to vest* power where it will be exercised in the national government.” Secretary Root is a lawyer. He knows what the verb “vest” means. Vest means to give, to deposit a new power, not merely to apply an existing one to new conditions. His language is, to “vest power.” His ground and excuse and reason for “vesting” it is that it must be “placed”—placed, mark you—where it will be exercised. The necessary inference is that it is now vested in the states, and that they ought to be divested of it, because they do not exercise it. His method of vesting power again is like the President’s—not by amendment to the Constitution, whereby the people themselves can redistribute the powers which are theirs and which they originally distributed between our dual sovereignties, but “by constructions” which are to be “found.” Found by whom? By the very men who are to exercise the power construed into being or “found.”

An American citizen does not take an oath of allegi-

ance to any government. His oath of allegiance is to the Constitution. Every officer who serves the Federal government, from the President down, whether he be cabinet officer, judge, senator or representative, takes this oath. It is now proposed that the officers of the Federal government shall vest power in themselves by construction and that they shall increase their power through executive action. Think of it! And yet in all the land no hint or suggestion of impeachment.

This method of amending the Constitution does not require a two-thirds majority in each house, nor three-fourths of the states in confirmation of it. It is easy. It requires nothing but momentary forgetfulness of an oath registered in the chancel of God. It is not a personally dangerous thing to attempt or to do. It may perhaps even be applauded.

What is more, the President proposes to "make good"—a phrase he is fond of. I have no time to refer to all the circumstantial evidence, but run over in your minds our recent history: Root's part in it in the Philippines; the acts of our proconsular agent in Cuba, this proconsular agent having been a law clerk in Washington; the present condition of things in the canal zone, and the frequent chidings by the President of the courts where they do not decide to suit him, showing a purpose of bending and warping the personnel of the Supreme and other Federal courts to an incorporation of his policies by judicial construction as a part of the authority of the Federal government. No lawyer not entertaining an opinion favorable to these policies can go upon the bench unless he succeeds in fooling the President, or unless the President fools himself, as to such lawyer's legal opinions. Daniel Webster was right when he said that: "the judicial power cannot stand for a long time against the executive power." The President has already during his tenure of office appointed one-third of the Supreme Court and over one-half of the subordinate Federal judges.



Judges on the district and circuit bench, although they hold their offices during good behavior, feel ambition like other men and would like to fill vacancies upon the Supreme bench as they arise. They can furnish no course better calculated to bring about that result than to let it be known by their decisions as subordinate judges that they share the President's opinions, and among others, perhaps chiefly, his opinion of the rightfulness of "increasing" Federal power "by construction."

The difficulty of amending the Constitution is the excuse at heart for most Federal usurpations, this with, and even more than, the alleged "inaction of the states." It was well that at the beginning the practice of amendment should have been made extremely difficult. The important thing was to put the government upon its feet and teach it to march, as the French say; to stop experiments with the framework until the people had become accustomed to it. We have reached the point now where there are many amendments that ought to be made to the organic law, first, because they are highly beneficent in themselves; secondly, because we want to do away with this excuse and pretext of usurping power in order "to do good." It has been said that the Federal Constitution cannot be amended except as the result of some great cataclysm, or foreign or civil war. This is a mistaken statement, but it is true that it is very difficult indeed, to amend it, so difficult as to be, under ordinary circumstances, almost impossible. If you have a system which is too difficult of legitimate change you thereby invite illegitimate change or usurpation.

The first clause in the Constitution that ought to be amended is the amendatory clause itself. The practice of amending the Constitution ought to be a difficult one, but not so difficult as it is now. It would seem that to require a majority of 10 per cent, over one-half in each house, voting for two Congresses in succession to submit an amendment, would be a requirement sufficiently difficult in the initiative. This would require at present fifty-



one senators and two hundred and fifteen congressmen, and as that vote would be required in two successive Congresses, the scheme would give the people an opportunity to pass upon the proposed amendments tentatively when they came first to elect the first Congress after the proposal of the amendment. If to this were added that the proposed amendments should not become a part of the fundamental law unless they had been adopted both by a majority of the people and by a majority of the states, the practice of amendment would not be rendered so easy as to lead to many propositions of amendment, and still would be made easy enough to encourage a hope upon the part of those who wish to preserve our institutions that they would not be destroyed by the very organic difficulty of changing them.

It is not, however—note ye well—in this way that either President or secretary proposes to go about the introduction of reforms, or a redistribution of governmental powers. It is not proposed that it shall be done deliberately by amendment upon the initiative of the national legislature and upon the confirmation of the people in the states, but that powers are to be “vested” in the Federal government and that Federal powers are to be “increased” by “constructions” which are “to be found” or “by executive action” and “by legislative action” and by a judicial reading into the instrument of that which is confessed by the very language used not to have been written into it. There has been a recrudescence of federalism here lately, alarming in its proportions. We begin to hear a great deal once more about “inherent powers” “powers ordinarily exercised by sovereign nations,” and therefore as is claimed to be exercised by the Federal government. The President talks about court decisions which have left “vacancies,” “blanks” between Federal and state powers, and wants these vacancies and blanks filled, occupied, “by executive action,” “by legislative action” and “by judicial construc-

tion." No decision of any court could possibly have ever left a blank or a vacancy between the powers to be exercised by the Federal government and the powers to be exercised by the states. The moment the court decides that a given power is not one of those granted to the Federal government, either expressly or by proper and honest implication, that moment the court has decided *e converso* that it *is* a power reserved in the states by virtue of the Eleventh Amendment, is in other words one of the powers not delegated but reserved to the states "or to the people." What can be of more "national concernment" than murder, theft, insanity? Yet no one would contend that the Federal government was granted the power to legislate to punish them within the states.

Much has been written about what is meant by the phrase "or to the people." In my mind it is clear—the powers not delegated are reserved either to the states or "to the people" *for redistribution* as they may choose by amendment of the Constitution. Both state and Federal governments are their servants, not their masters. The people of the United States, acting within their respective states, have the right of distribution of governmental power. Again, individuals also have certain natural and inalienable rights, to which reference is likewise made in the phrase—these are by nature reserved to the people as rights not to be touched by state or by Federal government—by any governmental or political agency whatsoever. That man does not understand the nature of American institutions who thinks that arbitrary and unlimited power is vested anywhere under our system, even in a majority of the people themselves acting through any government or by themselves. There are things which under our system a majority cannot do, whether they are in their opinion right to be done or not. Thus high was the sacredness of individuality held by our forefathers.

I was talking a moment ago about the influence of

the executive over the judiciary. I quoted Daniel Webster to the effect that the judiciary could not stand long against the influence of the executive, and yet the spirit of the times is such that it has been gravely proposed in a bill introduced in the House to make this influence still greater. That bill, introduced on January 4, 1907, provides that the President "whenever in his judgment the public welfare will be promoted by the retirement of a judge" may retire him, "with the advice and consent of the Senate," and appoint somebody else, who shall take his place. This would give to the President and the Senate of the United States absolute control over the judiciary.

Our executive department has carried the Root doctrine into its dealings with Congress. Where Congress will not enact legislation that the executive wants, some administrative department construes it to exist, as was the case in the graded age pension ukase issued by the Commissioner of Pensions. A bill had been pending in Congress to accomplish the precise result. Congress would not pass it. The executive, through the Commissioner of Pensions, amid popular applause, construed it into existence.

When, later, it was proposed upon a general appropriation bill to insert a clause enacting into law the graded pension system thus promulgated, the point of order was raised that the motion could not be entertained by the House when a general appropriation bill was under consideration, because it was "contrary to existing law." In other words, that the amendment containing the very language of the ruling of the Commissioner of Pensions was a change of existing law. This point of order was sustained. Sustaining it was an admission of the fact that the executive order had promulgated a new law—that a branch of the executive had legislated. If, on the contrary, the point of order had not been sustained, then the very fact of the adoption of the amendment would

have been a confession of the fact that Congress needed to act in order to make good that which by executive order had been promulgated.

A treaty with Santo Domingo was pending before the Senate of the United States, which the Senate for a long time refused to confirm. The executive, being determined to have its own way, Senate or no Senate, did, as a historical fact, for two years before the ratification of the treaty by the Senate, execute the terms of the treaty.

The President at one time had a nomination of a certain South Carolina negro named Crum pending in the Senate, and the session came to an end without action on it. Thereupon an extraordinary session having been called to begin at 12 o'clock on the very day upon which the former session expired, Secretary Root and the President, between them, construed into existence what they called "a constructive recess." That is, that between the beginning of 12 o'clock meridian and the end of the same 12 o'clock meridian on a given day "there had been a recess," and this being the case the President had a right to reappoint this proposed appointee during this so-called recess. He *did* reappoint him thus contrary to law and the Senate was subsequently coerced or persuaded to confirm him.

The logical inconsistency of public opinion in America was never better shown than with regard to this incident. The President's construction into existence of a constructive recess for the purpose of saving his right of appointment aroused no indignation, although it was the act of one man. He had, however, set a precedent which soon found imitators. If there had been a recess, then members of Congress were entitled to mileage for the recess, rather for the new session following it. They, therefore, very logically, according to the precedent set by the executive (although, of course, very wrongfully, but no more wrongfully than the President) and voted themselves mileage for the "recess." A storm of disapproba-

tion from the throats of the people and the columns of the newspapers swelled to heaven. The Senate voted the extra mileage out and President, people and all "congratulated the country." The man who imagined the iniquitous thing and acted upon it secured the result that he aimed at and was little, if at all, criticised. The very Senate that voted extra mileage out of the law upon the ground that there had been no constructive recess, finally confirmed the appointee whom the President had hurled back at them upon the theory that there had been a constructive recess.

Franklin Pierce, in a recent book that ought to be taught in every school and college where civil government is taught, a book entitled *Federal Usurpation*, from which I have drawn much for this speech, says: "Social evolution progresses actually with the importance of the citizen over the state and decreases in the proportion of the importance of the state over the people." All these propositions of adding to the powers of government by "executive action" and "legislative action" and "judicial construction" and "constructions to be found" leave that great truth out of sight. I know of no people who have too little government. We do not want an America like Sparta, where the state was all and man was nothing. We want no Rome even, where responsibility was so entirely devolved upon government that when government itself grew weak there was no initiative left among the people even to resist invasion—a herd of helpless sheep, they were.

Our weight of political machinery is increasing all the time. Not many years ago there were about two hundred special agents and detectives in the employ of the government. There are over three thousand now, going around hunting up by detective methods violations of Federal statutes. A detective is like an expert in the medical profession. He generally finds what he is seeking. God never made a throat or nose to suit a throat

and nose expert; he never made a pair of eyes to suit an eye specialist. The Department of Justice uses a great many of these detectives. When you begin to inquire under what authority of law, it is difficult to procure an answer. That department seems to borrow them from the Treasury Department. In other words, they are detailed from the Treasury Department to do work for the Department of Justice. The law appropriating for them in the Treasury Department appropriates for them for the expressed and sole purposes of ferreting out and procuring punishment of counterfeiter and violators of the internal revenue laws. They are being used for a hundred other purposes—peonage is the immediate fad—public land stealing was a few months back. In so far as special agents are being used for the purpose of investigating trusts and bringing them to book, there is authority of law independently.

Judge George Gray well says in a recent speech that: "In Rome when a dictator was appointed, his instructions were 'to take care that the state receive no harm.'" This was a pretty broad authority. Mr. Bryce, the author of *The American Commonwealth*, seems to think from what he says that our Presidents in times of acute peril may or must, act on a like instruction. The present President [Roosevelt] does not seem to think that it is necessary to wait for a time of acute peril, but that the instruction is good "for any old time."

When the New York Constitutional Convention adopted the Constitution of the United States, it adopted it with the proviso that there should be no extension of power "by legal fiction." This was to prevent usurpation of Federal power by construction. How far the power of legal fiction may carry a system of laws may be realized when it is remembered that from the twelve tables of ancient Rome there grew up by construction and legal fiction the *corpus juris civilis*, and from a lot of old customs there grew up by court precedents nearly all of the body of what we call our "common law."



The only restraint that we have upon executive usurpation is either judicial constraint or impeachment, and the only restraint that we have upon judicial usurpation by construction is the power of impeachment by the House of Representatives before the Senate acting as a grand court of impeachment. It requires two-thirds of the senators to convict and the sole penalty is deprivation of office. The process is surely difficult enough at best and the penalty light enough. The Swain case, however, shows to what extent we have gone in limiting that power. Federal judges are chosen, to use the words of the Constitution, "during good behavior." It would seem that their independence is sufficiently protected by this tenure and the difficulty of obtaining a verdict of removal by two-thirds of the Senate. But if we are to learn any lessons from the Swain case at all, the phrase, "during good behavior," has been construed to mean "during life, except when the judge has violated the express provisions of a penal statute." The power of impeachment was given to protect the people from "high crimes." They are necessarily indefinable. What higher crime can there be than treason? What greater treason than treason to the Constitution, our sole sovereign, to whom alone we swear allegiance? What greater treason than the terrible attempt by a judge to destroy the integrity of the organic law by construction, with deliberate intent to make law or to increase Federal power? Yet our President and his chief secretary encourage this very form of treason, insidious and horrible, and there neither is nor can be any penal statute against it.

Do not misunderstand me. There is a difference between these latest day propositions and the application of an undoubtedly granted power to a new condition. If the Federal government had been granted expressly or by fair and honest implication power over a given subject matter, no change of phrase in that subject matter can balk the application of the power. The power



over interstate commerce, for example, could not be limited because human invention had brought into existence steam railways as instrumentalities of commerce. But it remains true that in construing the organic law the duty of the judge lies in holding to the old maxim, "*Ita lex scripta.*" Nor is it necessary to enter into the formerly mooted question as to whether this construction should be narrow or broad, strict or liberal. What we want is an honest and sincere construction of the real words and the real intent and the real purpose "nought extenuating nor setting down aught in malice." Otherwise construers of law become makers of law—judges become legislators.

I am one of those who believe that infinite damage has been done by the study and popularity of Hon. James Bryce's book, *The American Commonwealth*. It is almost impossible for an Englishman to understand our system based upon the underlying theory of a written Constitution. The constitution of Great Britain is a thing of construction, or evolution, of growth by judicial construction—growth by changing opinion. Parliament has unlimited power, subject to certain fundamental natural rights of the individual which, broadly stated, are "the inherited rights of free born Englishmen." Mr. Bryce, therefore, in dwelling with apparent pleasure upon the fact that the Constitution of the United States might be changed by judicial construction (changed now, mark you, not developed) was acting very naturally for one of his environment and training. He could not appreciate the horror in the mind of a real American—really in love with the institutions of his own country—for the very thing which he dwells upon with a tolerant, if not a favorable eye.

I shall not say much more, however, about judicial usurpation, because there has not been as much usurpation by that branch of the government, either attempted or consummated, as by the other two. Upon the whole,

our judiciary has rather preserved the Constitution from popular passion and impulses, from party spirit and sectional hate, and as Congress, and the executive grow wilder, it sets aside from year to year a larger and larger proportion of their acts. During the entire period before the Civil War it had set aside only two or three general acts. Just how many multiples of that number have been declared unconstitutional since I cannot now say, but we have grown accustomed to the Supreme Court's checking up Congress and the President every now and then, and the prayer of every good American is that it may do so "more and more unto the perfect day."

Yet the judiciary has made some apparently queer decisions lately. In *Mankichi's* case, which came up from Hawaii, there had been no indictment nor any unanimous verdict of twelve men—in our constitutional sense a jury verdict—against the prisoner, and yet the Supreme Court affirmed the case upon the ground that the laws of Hawaii when annexed to the United States had not required an indictment and had made provision for a jury that did not find a verdict by unanimity. Upon what principle the court arrogated to itself the right to say just what fundamental constitutional principles should go with the Constitution to Hawaii simultaneously with the annexation, and which of those fundamental notions should remain behind, to go later or not at all, presents a curious study.

The gradual growth of injunctions in Federal courts constitutes the chief thing to complain of in connection with that branch of our government. Originally the equitable right of injunction was issued when the law remedy was inadequate or the damage irreparable and did not apply to crimes. In *Lennon's* case,<sup>1</sup> however, men were actually enjoined for refusing to haul cars of a railroad and for leaving the employ of a railroad, while

<sup>1</sup> 166 United States.

under the charge of a receiver appointed by a Federal court, on the ground that their quitting the employment "crippled the railroad's operation," and I believe, if I remember correctly, also upon the ground that it interfered with interstate commerce. This injunction was issued in spite of the Thirteenth Amendment, which forbids "involuntary servitude except for crime."

If everything that can be construed to be an interference with interstate commerce is to be taken as a just ground for an injunction, a man who shoots another riding on a ticket from Philadelphia to New Orleans would, so far as I can see, subject himself to Federal penalties instead of being simply tried for murder, according to the laws of the state of the place where he committed the murder. Even when United States penal statutes exist, where a man can be arrested upon affidavit and rendered harmless, the Federal courts still issue injunctions.

The power to inflict punishment for indirect contempts—constructive contempts—contempts committed not in view of the court, punishments which carry deprivation of liberty and deprivation of property without a jury trial is another abuse. These things encourage a spirit of anarchy. Every man, if possible, ought to have a trial by jury. Injunctions are issued by one judge on *ex parte* hearing, on mere affidavits without notice even to the defendant and on reference of questions of fact to the referee. Upon such evidence as that and upon such findings of fact as that the enforcement of state laws, passed deliberately by state legislatures and approved by state executives, is enjoined. The plea generally is that the state law is "confiscatory." Of course when upon a hearing properly had after due notice to both sides, and a proper investigation of the facts, state legislation is found to be really confiscatory, it must be set aside by permanent injunction as conflicting with the Constitution of the United States. But that is not the question here.

The question is whether the temporary restraining order issued *ex parte* upon mere affidavits and so-called ascertainment of fact by a master in chancery, very little acquainted with the subject matter and very little able to judge of it, should prevail, to annul a state statute.

Let us notice a tendency to usurp Federal power under the treaty clause. Calhoun says that treaties are the supreme law of the land "provided such regulations (in treaties) are not inconsistent with the Constitution." I quote Calhoun because he went further than almost anybody in maintaining the plenary power of the Federal government to regulate our intercourse with foreign powers. If the treaty attempt to treat concerning some subject matter, the regulation of which is not delegated to any branch whatsoever of the Federal government, then that treaty is "inconsistent with the Constitution." as being inconsistent with the purpose for which the Federal government was formed. If it attempt to treat of some subject matter the regulation of which is delegated to any branch, I care not which one, of the Federal government, I admit the plenary power of the Federal government. That the treaty can give an alien equal rights with the citizen, even within a state concerning a subject matter that the Federal government would otherwise not control, I do not doubt; but that it can give him superior privileges to a citizen I deny. If by treaty with Japan, for example, California can be forced to admit Japanese, or by treaty with China it can be forced to admit Chinese, to the same schools with white children, then by treaty with Haiti or Santo Domingo negroes from those islands could be admitted to the same schools with white children in Mississippi, let us say, where native-born negroes, citizens of the United States, cannot attend white schools.

The President in a Massachusetts speech is quoted as saying: "States rights ought to be preserved when they mean the people's rights, but not when they mean the

people's wrongs." In God's name who is to say what are people's rights and what are people's wrongs? If I undertook to answer the question I should say *the people themselves*. And then if I were asked further—how they were to say it or have said it, how they were to draw the line or have drawn it, how they were to prescribe the people's rights and proscribe the people's wrongs—I would say through the fundamental organic law—the Constitution of the United States, and in the constitutions of the several states, which are *the prescribing voice of the people themselves*. "Thus far and thus far only shall any government authority over man ever go."

We are running mad. The latest proposition is to have a law for Federal registration of automobiles, on the ground that automobiles do sometimes travel over state lines! It is proposed by the President to charter, and by Mr. Bryan to license, corporations chartered by the states, to enter into interstate business. The President's latest astounding proposition is to leave a branch of the executive government to distinguish between good trusts and bad trusts, mark out one for a license to do business and another for extirpation while maintaining the substantive part of the present anti-trust law. What a campaign contribution breeder that would be! How the combinations and trusts—the present substantive law being cunningly retained—would run over one another in contributing to the campaign funds of whichever party was in power in order to bias the Executive Department of that party in finding them good and not bad!

I have referred once before to administrative usurpations of Federal power as the most dangerous because most insidious and least seen by the average citizen. I wish that some of you, who have time to do it, would study the case of Ju Toy, a Chinaman, reported in 198 U.S. This man was born in the United States, went to China on a visit and came back; was sentenced to

deportation as an alien by the immigration commissioner, whose sentence was affirmed by the Secretary of the Treasury. In some way the poor devil managed to communicate with a lawyer and to avail himself of *habeas corpus* proceedings. The referee found Toy's statement that he was born in America to be true. The case finally got to the Supreme Court. The court decided that the question of fact as to whether he was or was not a native-born citizen of the United States had been decided by an administrative tribunal authorized to try it, and that that finding was final and conclusive. In other words, that it made no difference whether, as a matter of fact, Toy was a natural-born citizen or an alien, he was banished, and that was all there was to it!

It is not alone in connection with this case that the courts have held that they could not question the conclusions reached by executive and administrative tribunals, and that no appeal to any court would lie, but in other matters as well. The power reposed in the Post Office Department, although it has not as yet been as seriously abused as it may be, is a power out of which the destruction of the entire principle of the freedom of the press may flow. The department may tomorrow, if it choose, cut off the *New York Times*, or the *North American Review*, or *Collier's Weekly*, from the right to be transmitted through the mails under a fraud order. If it chose there would be no appeal to any court. It could, furthermore, if it chose, refuse by a fraud order to permit any mail to be delivered to either of them, or to me, or to you. It could do this upon the report of detectives in the department, and perhaps the first we would hear of it would be missing our mail. And may be upon complaint and inquiry by us as to the exact point in which we had offended the department might furthermore return the answer that it was "not practicable to make a reply" to our inquiry. Franklin Pierce, at any rate, quotes a case in the book to which I have



referred, where certain printed matter was excluded from the mail on the ground of "obscenity." The department was asked to specify in what respect and how and where there was anything obscene in the printed matter, and it is quoted to have replied that it was "not practicable" to answer the inquiry. It is not to the purpose to reply that the department would not do what I have supposed. That it *might* is a sufficient danger to human liberty.

In the case of South Carolina against the United States,<sup>1</sup> the Supreme Court says of our Constitution—which, I repeat, is the only sovereign in America, except the people themselves acting in a prescribed way while exercising the power to amend and change it—the Supreme Court says of that Constitution that it "speaks not only in the same way, but with the same meaning and intent with which it spoke when it came from the hands of its framers and was voted on and adopted by the people." That phrase ought to be memorized by every schoolboy who is studying "civil government" in a public school. Whatever the British constitution may be—unwritten, not exactly definable—the American Constitution is an instrument of written, prescribed, fixed sentences, phrases and words, that do not dance about kaleidoscopically upon the printed page and bear different meanings today and tomorrow, but mean just what they meant when they were uttered, although today, of course, they may be applied to very many conditions and instrumentalities that did not exist then. "Whenever an end aimed at is constitutional, then all proper means to that end are also constitutional." The great Federal judge himself, John Marshall, uttered these words. The converse to that is not true, to wit, that whenever a certain means is constitutional, therefore the end aimed at is constitutional. Congress has a right, for example, to regulate interstate commerce, but if the end

<sup>1</sup> 166 United States.



aimed at be not in verity the regulation of interstate commerce, but be the regulation of child labor, or manufacturing, or education within a state, and the interstate commerce clause of the Constitution be resorted to merely as a means to the accomplishment of this latter end—an end which in itself is unconstitutional—then the thing sought to be done is exactly the opposite of that which John Marshall said could be constitutionally done.

One of the things most precious in our dual system of government is that the very fact of there being so many state governments in so many different climates, with so many different sorts of populations, so many different systems of agriculture, such diversity of pursuits and occupations, heredity and environment, enables our laws through the instrumentalities of the state legislatures to be adapted to the needs of the communities. Thus the states become great experimental fields. South Carolina can experiment with the dispensary law. If damage ensue it is limited to South Carolina. The people of the balance of the states can watch it without harm and learn lessons, find out if it is to be imitated or avoided. If Oklahoma wants to make an experiment of governmental guarantee of bank deposits, the balance of the union can watch the experiment with interest and with profit, without loss, no matter how it turns out. If Oregon wishes to try the experiment of initiative and referendum the same observation is applicable. All of us can watch the experiment of woman's suffrage in Colorado and some day imitate it or else learn to avoid it. And so with infinite diversity of surroundings and influence, with emulation existing between localities, the Federal government does not need to experiment. In other lands experiments, if harmful, are national hurts.

The very maxim, "*E pluribus unum*," is a Federal maxim. We must preserve not only the "one," but we must preserve with equal care and jealousy the integ-

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rity of the "many" governments which constitute our system—an "indestrucible union of indestructible states"—"a republic of lesser republics."

May God grant that Jefferson prove right and Macaulay prove wrong and that this constitutional, democratic-federal republic of ours prove not a failure, as it assuredly must, if individual self-government—based on the "self-denying ordinance of a majority" denying absolutism to itself even—and if local self-government, or home rule—based on the reserved rights of the states—be lost sight of by us or our children.

### JUDICIAL USURPATION<sup>1</sup>

A proposition was made in the convention—as we now know from Mr. Madison's *Journal*—that the judges should pass upon the constitutionality of acts of Congress. This was defeated June 4, receiving the vote of only two states. It was renewed no less than three times, *i.e.*, on June 6, July 21, and finally again for the fourth time on August 15; and though it had the powerful support of Mr. Madison and Mr. James Wilson, at no time did it receive the votes of more than three states. On this last occasion (August 15) Mr. Mercer thus summed up the thought of the convention: "He disapproved of the doctrine, that the judges, as expositors of the Constitution, should have authority to declare a law void. He thought laws ought to be well and cautiously made, and then to be incontrovertible."

Prior to the convention, the courts of four states, New Jersey, Rhode Island, Virginia and North Carolina, had expressed an opinion that they could hold acts of the legislature unconstitutional. This was a new doctrine never held before (nor in any other country since) and met with strong disapproval. In Rhode Island the move-

<sup>1</sup> By Hon. Walter Clark, Chief Justice of North Carolina. *Arena*. 37: 149-53. February, 1907.

ment to remove the offending judges was stopped only on a suggestion that they could be "dropped" by the legislature at the annual election, which was done. The decisions of these four states were recent and well-known to the convention. Mr. Madison and Mr. Wilson liked the new doctrine of the paramount judiciary, doubtless deeming it a safe check upon legislation to be operated only by lawyers. They attempted to get it into the Federal Constitution in its least objectionable shape—the judicial veto before final passage of an act, which would save time and besides would enable the legislature to avoid the objections raised. But even in this diluted form, and though four times presented by these two very able and influential members, the suggestion of a judicial veto at no time received the votes of more than one-fourth of the states.

The subsequent action of the Supreme Court in assuming the power to declare acts of Congress unconstitutional was without a line in the Constitution to authorize it, either expressly or by implication. The Constitution recited carefully and fully the matters over which the courts should have jurisdiction, and there is nothing, and after the above vote four times refusing jurisdiction there could be nothing, indicating any power to declare an act of Congress unconstitutional and void.

Had the convention given such power to the courts, it certainly would not have left its exercise final and unreviewable. It gave the Congress power to override the veto of the President, though that veto was expressly given, thus showing that in the last analysis the will of the people, speaking through the legislative power, should govern. Had the convention supposed the courts would assume such power, it would certainly have given Congress some review over judicial action and certainly would not have made the judges irretrievably beyond "the consent of the governed" and regardless of the popular will by making them appointive and further

clothing them with the undemocratic prerogative of tenure for life.

Such power does not exist in any other country and never has. It is therefore not essential to our security. It is not conferred by the Constitution, but, on the contrary, the convention, as we have seen, after the fullest debate, four times, on four several days, refused by a decisive vote to confer such power. The judges not only have never exercised such power in England, where there is no written constitution, but they do not exercise it in France, Germany, Austria, Denmark, or in any other country which, like them, has a written constitution.

A more complete denial of popular control of this government could not have been conceived than the placing such unreviewable power in the hands of men not elected by the people and holding office for life. The legal tender act, the financial policy of the government, was invalidated by one court and then validated by another, after a change in its *personnel*. Then the income tax, which had been held constitutional by the court for an hundred years, was again so held, and then by a sudden change of vote by one judge it was held unconstitutional, nullified and set at naught, though it had passed by a nearly unanimous vote of both Houses of Congress, containing many lawyers who were the equals if not the superiors of the vacillating judge, and had been approved by the President and voiced the will of the people. This was all negatived (without any warrant in the Constitution for the court to set aside an act of Congress) by the vote of one judge: and thus one hundred million dollars, and more, of annual taxation, was transferred from those most able to bear it and placed upon the backs of those who already carried far more than their fair share of the burdens of government. Under an untrue assumption of authority given by thirty-nine dead men one man nullified the action of Congress and the President and the will of seventy-five millions of living people, and in

the thirteen years since has taxed the property and labor of the country, by his sole vote, \$1,300,000,000, which Congress, in compliance with the public will and relying on previous decisions of the court, had decreed should be paid out of the excessive incomes of the rich.

In England one-third of the revenue is derived from the superfluities of the very wealthy, by the levy of a graduated income-tax, and a graduated inheritance-tax, increasing the per cent with the size of the income. The same system is in force in all other civilized countries. In not one of them would the hereditary monarch venture to veto or declare null such a tax. In this country alone, the people, speaking through their Congress, and with the approval of their executive, cannot put in force a single measure of any nature whatever with assurance that it shall meet with the approval of the courts; and its failure to receive such approval is fatal, for, unlike the veto of the executive, the unanimous vote of Congress (and the income tax came near receiving such vote) cannot avail against it. Of what avail shall it be that Congress has conformed to the popular demand and enacted a "rate regulation" bill and the President has approved it, if five lawyers, holding office for life and not elected by the people, shall see fit to destroy it, as they did the income tax law? Is such a government a reasonable one, and can it be longer tolerated after one hundred and twenty years of experience have demonstrated the capacity of the people for self-government? If five lawyers can negative the will of one hundred million of men, then the art of government is reduced to the selection of those five lawyers.

A power without limit, except in the shifting views of the court, lies in the construction placed upon the Fourteenth Amendment, which passed, as every one knows, solely to prevent discrimination against the colored race, has been constructed by the court to confer upon it jurisdiction to hold any provision of any statute what-

ever "not due process of law." This draws the whole body of the reserved rights of the states into the maelstrom of the Federal Courts, subject only to such forbearance as the Federal Supreme Court of the day, or in any particular case, may see fit to exercise. The limits between state and Federal jurisdiction depend upon the views of five men at any given time; and we have a government of men and not a government of laws, prescribed beforehand. At first the court generously exempted from its veto, the police power of the several states. But since then it has proceeded to set aside an act of the legislature of New York restricting excessive hours of labor, which act had been sustained by the highest court in that great state. Thus labor can obtain no benefit from the growing humanity of the age, expressed by the popular will in any state, if such statute does not meet the views of five elderly lawyers, selected by influences naturally antagonistic to the laboring classes and whose training and daily associations certainly cannot incline them in favor of restrictions upon the power of the employer.

The preservation of the autonomy of the several states and of local self-government is essential to the maintenance of our liberties, which would expire in the grasp of a consolidated despotism. Nothing can save us from this centripetal force but the speedy repeal of the Fourteenth Amendment or a recasting of its language in terms that no future court can misinterpret it.

The vast political power now asserted and exercised by the court to set aside public policies, after their full determination by Congress, cannot safely be left in the hands of any body of men without supervision or control by any other authority whatever. If the President errs, his mandate expires in four years, and his party as well as himself is accountable to the people at the ballot-box for his stewardship. If members of Congress err, they too must account to their constituents. But the Federal



judiciary hold for life, and though popular sentiment should change the entire *personnel* of the other two great departments of government, a whole generation must pass before the people could get control of the judiciary, which possesses an irresponsible and unrestricted veto upon the action of the other departments—irresponsible because impeachment has become impossible, and if it were possible it could not be invoked as to erroneous decisions, unless corruption were shown.

The control of the policy of government is thus not in the hands of the people, but in the power of a small body of men not chosen by the people, and holding for life. In many cases which might be mentioned, had the court been elective, men not biased in favor of colossal wealth would have filled more seats upon the bench, and if there had been such decision as the income tax, long ere this, under the tenure of a term of years, new incumbents would have been chosen, who, returning to the former line of decisions, would have upheld the right of Congress to control the financial policy of the government in accordance with the will of the people of this day and age, and not according to the shifting views which the court has imputed to language used by the majority of the fifty-five men who met in Philadelphia in 1787. Such methods of controlling the policy of a government are no whit more tolerable than the conduct of the augurs of old who gave the permission for peace or war, for battle or other public movements, by declaring from the flight of birds, the inspection of the entrails of fowls, or other equally wise devices, that the omens were lucky or unlucky—the rules of such divination being in their own breasts and hence their decisions beyond remedy.

It may be that this power in the courts, however illegally grasped originally, has been too long acquiesced in to be now questioned. If so, the only remedy which can be applied is to make the judges elective, and for a term



of years, for no people can permit its will to be denied, and its destinies shaped, by men it did not choose, and over whose conduct it has no control, by reason of its having no power to change them and select other agents at the close of a fixed term.

As far back as 1820, Mr. Jefferson had discovered the "sapping and mining," as he termed it, of the life-tenure, appointive Federal judiciary, owing no gratitude to the people for their appointment and fearing no inconvenience from their conduct, however arbitrary, in the discharge of such office. In short, they possess the autocratic power of absolute irresponsibility. "Step by step, one goes very far," says the French proverb. This is true of the Federal judiciary. Compare their jurisdiction in 1801, when Marshall ascended the bench, and their jurisdiction in 1906. The Constitution has been remade and rewritten by the judicial glosses put upon it. Had it been understood in 1787 to mean what it is construed to mean today, it is safe to say that not a single state would have ratified it.

## THE CHILD LABOR AMENDMENT<sup>1</sup>

Congress, by the required two-thirds vote, passed the resolution reading as follows:

That the following article is proposed as an Amendment to the Constitution of the United States, which, when ratified by the Legislatures of three-fourths of the several States, shall be valid to all intents and purposes as a part of the Constitution.

"Section 1. The Congress shall have power to limit, regulate, and prohibit the labor of persons under eighteen years of age.

"Section 2. The power of the several States is unimpaired by this article, except that the operation of State laws shall be suspended to the extent necessary to give effect to legislation enacted by the Congress."

If and when three-fourths of the states ratify this resolution, it will become a part of the Constitution.

<sup>1</sup> By Duncan U. Fletcher, United States Senator from Florida. *North American Review*. 220: 238-44. December, 1924.

There is no limit of time within which it may be ratified. The members of the legislature of each state will be bombarded by propaganda and by voluntary agencies in order that they may, one by one, be induced to take favorable action. The Constitution puts no time limit on the period during which a proposal to amend it remains unacted upon. In addition to the nineteen amendments already made a part of the original Constitution, four other proposals for amendment have been submitted by the Congress, but have never been acted upon by a sufficient number of states to secure their ratification. Two of these have now been before the states for nearly one hundred and thirty-five years—since the first Congress, September 15, 1789. The third was proposed more than one hundred and thirteen years ago and is still pending. The fourth was submitted the day Abraham Lincoln was to be first inaugurated President. It behooves the states opposed to this amendment to reject it at the first session of the legislature at which it is possible to consider it, and thus end the confusion and danger. If more than one-fourth refuse to ratify it by affirmative action, that fact ought to be certified promptly, in order that it may be proclaimed as rejected by the states.

It is the most audacious proposal to change our whole theory and system of government ever suggested. I was surprised at the vote by which the resolution was adopted. I must believe that some members of Congress eased their consciences by the thought that while they would submit the matter to the states they did not believe the states would ratify his revolutionary enactment—because it means a complete surrender of most essential reserved powers of the states. In fact, if the states consent to the adoption, ratification and proclamation of this proposed amendment, they might as well consent to another amendment abolishing all state governments, for to continue the functioning of state governments after the ratification of this proposed Twentieth Amendment

would not be justified—the cost considered. The expenditure for administering state governments would not be warranted. The jurisdiction over what would be left might as well be transferred to Federal authority, thus putting the states out of business. The fears of those who opposed the ratification of the original Constitution as expressed in the conventions to which the ratification was referred, would be realized!

The Constitution, as the fathers framed it, guaranteed to each of the states a republican form of government. The Tenth Amendment, proposed in 1789, provides that—

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Chief Justice Marshall held “that immense mass of legislation, which embraces everything within the territory of a state not surrendered to the general government; . . . inspection laws, quarantine laws, health laws of every description, . . . are component parts of the mass,” and insisted they should not be encroached upon. And later he said, “The acknowledged power of a state to regulate its police, its domestic trade, and to govern its own citizens, . . . the power of regulating their own purely internal affairs, whether of trading or police,” must be conceded. He fully enunciated and sustained the principle of local self-government in local matters and the police powers of states.

The Supreme Court has declared over and over again that the regulation of child labor and such matters are the province of the states; that, generally speaking, the police power is reserved to the states and there is no grant thereof to Congress in the Constitution. This amendment proposes to give that power to Congress, without restrictions or limitations, as respects, the labor of persons under eighteen years of age.

It is claimed Congress will not fully use this unlimited power and will be reasonable in its exercise. We may use the past in judging the future. Congress passed an action on September 1, 1916, assuming a power it did not have, pretending to find warrant for it under the commerce clause of the Constitution which each member was sworn to support, and the Supreme Court said of it:

This act in a twofold sense is repugnant to the Constitution. It not only transcends the authority delegated to Congress over commerce, but also exerts a power as to a purely local matter to which the Federal authority does not extend. . . . If Congress can thus regulate matters intrusted to local authority by prohibition of the movement of commodities in interstate commerce, all freedom of commerce will be at an end, and the power of the States over local matters may be eliminated, and thus our system of government is practically destroyed.

Congress still persisted in trying to circumvent the Constitution and sought out the presumed power to tax on which to hang the legislation to regulate child labor, and passed the act of February 24, 1919. When this act came before the Supreme Court, by an almost unanimous opinion it was declared to deal "with subjects not intrusted to Congress, but left or committed by the supreme law of the land to the control of the states," and it was added that "to give such magic power to the word 'tax' would be to break down all constitutional limitation of the powers of Congress and completely wipe out the sovereignty of the states."

This amendment is now proposed in order that Congress may have this power to do that very thing. They have tried twice to do it when there was no constitutional power. Now they ask to be given that power. It is inconceivable that the states will be guilty of the folly involved in attempting to grant such power.

If Congress will proceed repeatedly to enact legislation not authorized by the Constitution and in violation of the Constitution, in order to take over the control, direction and management of the social and domestic

affairs within the exclusive jurisdiction of the states, what may it be supposed Congress will do when it shall be granted the unlimited and vast authority proposed by this amendment? The new nation which "our fathers brought forth on this continent, conceived in liberty and dedicated to the proposition that all men are created equal," we are asked to say shall not endure. "Freedom is the last best hope of the earth," we are now to learn is a mistaken doctrine. The man making those announcements went to work when he was seven years of age. His biographers tell us, "During his years in Indiana young Abraham grew strong and athletic and long before he was twenty he made a full hand at all kinds of heavy work."

It is proposed now to send out to the humble homes of Thomas and Nancy Lincolns, all over the country, and tell them how to rear and treat their children. We shall have agents of the Federal government to direct what shall be the occupation, the recreation, the environment of their girls and boys. It is proposed to set up a guardianship over the children of those "plain folks" who have furnished the country Presidents, congressmen, governors, judges, ministers, teachers, and leaders in industry. We shall even intervene between parent and child, and advise the child to disobey the parent and flout the domestic authority. It will discredit the judgment of the parent with the child, displace the parent as guide and adviser. It will destroy the respect and lessen the affection which should obtain in the family relation. There is strong evidence that the only progress the world has made for over three thousand years has been along social lines, if we may include the uses of steam and electricity. It is proposed now to set that back to the beginning.

A large number of new jobs will be created. That feature impresses a good many people. It will cost a large amount of money to enforce the laws Congress will enact. Who will pay the expenses? The philanthropic,

benevolent, kind-hearted, self-appointed friends of the "persons" under eighteen years of age will contribute little revenue along with much advice and insistence for more powers, extension of the work, and unlimited control. Mr. Average Individual pays \$103.84 taxes a year. He would like to feel that this is not to be used to interfere with his family relations, his household affairs, and to oppress him. He has supposed that when any regulating was required it was an affair of his state. He recalls that Section 4 of Article IV of the Constitution of the United States provides that "The United States shall guarantee to every state in this union a republican form of government," and so forth. He wonders why it is proposed now to bore into the Constitution, disregard this mandate in the fundamental law, and, instead, give the states dictatorial government directed from Washington.

Are we to permit surface-minded sentimentalists, unthinking enthusiasts, to change the government from one by the people to one by self-appointed dictators?

The second section amounts to nothing. All state laws must give way before the laws of Congress. Nothing is reserved by this section that is embraced by the first section. Congress becomes the supreme lawmaking power in dealing with the subject. The state might as well abandon every attempt to handle it. They are to be silenced. Their laws are to be suspended. Congress will now legislate and be obeyed. This section merely repeats what was laid down in *Fletcher vs. Peck* in 1810.

Not only is the power granted, in the first section, to Congress, but along with it goes the power to make the grant effective. This may mean that the power to prohibit the labor of persons under eighteen years of age and to prescribe the conditions of such labor will include the power to prescribe how persons under eighteen shall be occupied, how and to what extent they shall be educated, and what standard of conduct must be observed.



The powers granted to Congress by such an amendment to the Constitution, and necessarily implied, would involve and include, it may reasonably be held, national control of education and of the care, custody, and guardianship of all minors under eighteen years of age. The Children's Bureau would have its hands full.

The idea of regulating, much less prohibiting, the labor of a person seventeen and one-half years of age is absurd. Youthful labor may be invaluable to such a person as well as to a large family of struggling people. Such an amendment followed by the legislation it warrants would bring great distress to many families, throw many children into idleness, prevent them from acquiring knowledge and experience to fit them for some gainful occupation, deprive them of opportunities, and destroy their future. It would mean turning over to Congress the care, custody and control of forty million human beings.

Another large force would be given positions as special agents to enforce the legislation Congress would enact and add to the six hundred thousand now at Washington and in the field. Every state has child labor laws generally suitable to local conditions. A statute or set of regulations prepared by a Federal bureau might be adapted to one state but be wholly inapplicable to another. The substitution of bureaucracy for democracy, the centralization of power, the surrender of sovereign rights, the abandonment of local self-government, are the controlling considerations. Let us not break down the principles upon which our government rests.

On May 28, 1924, I concluded my remarks before the Senate on the resolution in these words, which I repeat:

I cannot believe that this proposed amendment under discussion will be passed in this body by the requisite vote. If it should be submitted to the States, I cannot conceive of a sufficient number ratifying it to make it a part of the Constitution, now or at any other time. My hope would be that it would take its place



with those submitted one hundred and thirty-four years ago and now forgotten.

Mr. President, I wish above everything else that I might adequately respond to the call of this hour. I hope in this debate some one will measure up to the commanding responsibility which now confronts us. We are to preserve American institutions or abandon them as out of date and weak. Truth, justice, honor, never get old or need revision. We are to hold fast to the system of government laid in the blood and treasure of a free people, designed by the inspired vision and wisdom of the master builders, or discard that system for one which the experience of mankind has discredited. The century-old conflict between dominion founded upon power and a confederacy founded upon law has never met but one ending wherever waged. Between an autocracy or a dictatorship and democracy the gulf is wide and can never be successfully bridged. We hoped to develop true constitutional liberty here. We aspired to be a Nation that loves liberty—where every man is set free to do his best and be his best.

The danger the early statesmen apprehended now confronts us—the centralization of power in the National Government, the destruction of local self-government, and the relinquishment of the sovereign powers of the State. Against that those farseeing patriots set their souls, and we have had no occasion to question their wisdom. They would be distressed beyond measure if they could look upon this vital thrust at the sacred system of their prayerful making. I would stay the hands that would strike that blow. It is supreme folly and inexcusable rashness to push down the pillars of the temple.

## FEDERAL SUBSIDIES TO THE STATES<sup>1</sup>

### THE FIFTY-FIFTY SYSTEM OF FEDERAL AID

The particular kind of Federal aid to which this address will be devoted is, the "fifty-fifty" system. This only began as late as 1914, and under it each state must match the Federal appropriation to which it is entitled with an equal amount of state funds, and must agree to submit to supervision or control by the Federal government over the expenditure of this Federal money within the state and over the purposes on which it is expended there. There are other kinds of Federal aid or subsidies,

<sup>1</sup> Address of Governor Albert C. Ritchie of Maryland at the Annual Convention of the Pennsylvania State Chamber of Commerce, Harrisburg, Pa., October 15, 1925.

but in this address I do not mean to discuss the merits or demerits of these.

The fifty-fifty system is not explained anywhere better than in a paper by Ben A. Arneson, published in the *American Political Science Review* for August, 1922, pages 443-54.

Mr. Arneson summarizes this system as follows:

The resemblances among the six Acts establishing conditional subsidies are striking. Each one provides for close co-operation between the Federal Government and the State and gives the Federal officers great powers over the co-operating State agency. In every case the statutes virtually declare certain State officials to be agents of the National Government to the extent that their relationship with National officials is defined and established. In no case is the State under any compulsion to accept the law and the relationship is entered upon voluntarily. The requirement that the State must match the National appropriations from State or local treasuries is common to all the Acts.

#### THIS SYSTEM OF FEDERAL AID IS UNSOUND GOVERNMENTALLY

From a governmental point of view, the unsoundness of the fifty-fifty system lies principally in the fact that it applies to purposes which are inherently local in their nature, and the Federal Government secures the right of supervision or control over these purely local functions by exacting it from the states as a condition to giving back to them some of the money which the government taxed their people to raise, the Federal government thus getting indirectly and by bargain a right of control over local affairs which it could not exercise directly under the Constitution.

I have yet to hear any answer at all to this objection. Some arguments which may at least be called plausible or practical are offered in favor of Federal aid or subsidies which involve straight Federal appropriations only, and in return for which the government does not demand the right of Federal supervision. Arguments of a practical nature are made in behalf of the fifty-fifty sys-

tem, too, as will be shown, but so far as I know no one undertakes to contend that this system involves a sound governmental policy or principle. Indeed, no one can contend that it does, because it simply cannot be argued that the Federal government has any right to use Federal funds as a means of acquiring a control over local state purposes which under the Constitution is not granted to the government but is reserved to the states. Such a thing strikes at the very heart of American institutions and destroys the American theory of local self-government.

There are doubtless some who believe that the country has outgrown state lines entirely, and who think that each locality has become so dependent upon every other locality, and that the poorest state adds so directly to the wealth of the richest state, that the whole country can be better governed through Federal centralization than by preserving the autonomy of the states.

That, of course, is the nationalist view, rejected by the United States Constitution, and all who would like to see it adopted now are perfectly free to urge it through the legal and orderly method of amending the Constitution. But no one ought to countenance the securing of Federal control and supervision over local state functions through a species of bargain and sale such as the fifty-fifty system of Federal aid involves. That, under our present Constitution, is simply indefensible.

Yet as long as the system is open to any of the states, all of the states must become parties to it. The wealthier states, of course, contribute nearly all the money, and they have to keep on doing so while the system lasts, because if they stop, the other states will get it all. If wealthier states do not come in under the system, then their citizens, who contribute most of the Federal funds, will do this solely for the benefit of the other states, and get nothing at all back for themselves.

## SUBJECTS WHICH RECEIVE FIFTY-FIFTY FEDERAL AID

Five principal subjects now come under the fifty-fifty system. These subjects, together with the total Federal aid extended to each, and the cost of maintaining the Federal bureau which administers each, during the fiscal year ending June 30, 1924, are:

	FEDERAL AID	COST OF BUREAU	TOTAL COST
Highway Construc- tion, Act of July 11, 1916 .....	\$79,217,397.90	\$1,230,025.98	\$80,447,423.88
Agriculture, Smith- Lever, Act May 8, 1914 .....	7,085,826.81	312,613.98	7,398,440.79
Vocational Edu- cation, Smith- Hughes Act, Feb. 23, 1917 .....	4,831,880.08	191,377.53	5,023,257.61
Vocational Rehabili- tation, Act of June 2, 1920 .....	551,265.65	68,439.60	619,705.25
Maternity and In- fant Hygiene, Shep- pard-Towner Act, Nov. 23, 1921 .....	889,463.86	35,577.32	925,041.18
	<hr/> \$92,575,834.30	<hr/> \$1,838,034.41	<hr/> \$94,413,868.71

Vocational rehabilitation has not been accepted by Colorado, Connecticut, Delaware, Florida, Kansas, Maryland, New Hampshire, Oklahoma, South Carolina, Texas, Vermont and Washington.

The maternity act has not been accepted by Connecticut, Illinois, Kansas, Maine and Massachusetts.

The venereal disease work, provided for by the Chamberlain-Kahn Act of July 9, 1918, has been practically discontinued.

What the states pay the government they pay in Federal taxes. What they get back from the government they get back in Federal aid. It is interesting, therefore, to compare the two, and see how much of the Federal taxes which each state pays comes back to it again as Federal aid under the fifty-fifty system.

I believe that the income taxes which each state pays furnish a fairer basis for this comparison than the total Federal taxes each state pays. Outside of income taxes, Federal receipts which go into the general treasury consist principally of custom duties, which cannot be apportioned among the states upon any uniform basis, and of internal revenue taxes, which are to a considerable extent produced from different sections of the country. Income taxes, however, reflect each state's contribution to the Federal revenues upon a uniform and comparable basis.

Nevertheless, I have compared the amount of Federal aid each state receives from the government under the fifty-fifty system both with the *total Federal taxes* (exclusive of custom duties) which each state pays to the government and with the *income taxes* which each state pays to the government.

#### TOTAL FEDERAL TAX PAYMENTS AND FEDERAL AID RECEIVED—1924

State	Amount Paid in Federal Taxes	Federal Aid Received from Government	Percentage of Fed. Tax Payments Re- turned to States as Fed. Aid
Nevada .....	\$761,499.64	\$1,845,945.98	242.41
North Dakota .....	1,282,838.91	1,487,858.96	115.98
South Dakota .....	1,951,248.95	2,094,133.10	107.32
New Mexico .....	1,131,323.68	787,170.90	69.58
Wyoming .....	2,088,353.27	1,347,850.58	64.54
Arizona .....	2,131,228.85	1,060,520.70	49.76
Idaho .....	1,976,084.28	955,638.10	48.36
Mississippi .....	4,949,236.73	1,849,120.76	37.36

State	Amount Paid in Federal Taxes	Federal Aid Received from Government	Percentage of Fed. Tax Payments Re- turned to States as Fed. Aid
Montana .....	2,958,039.08	1,003,638.56	33.93
Utah .....	4,087,186.96	1,079,708.04	26.42
Alabama .....	9,800,970.83	2,572,627.10	26.25
Arkansas .....	6,536,635.87	1,343,181.44	20.55
Oklahoma .....	13,520,563.14	2,595,645.89	19.20
Texas .....	36,863,758.04	6,154,965.59	16.70
South Carolina .....	8,938,278.96	1,464,140.48	16.38
Iowa .....	17,946,204.07	2,830,603.29	15.77
Oregon .....	10,500,237.48	1,613,605.15	15.37
Georgia .....	19,181,446.22	2,731,417.96	14.24
Kansas .....	20,735,282.63	2,828,683.50	13.64
Tennessee .....	18,633,646.12	2,139,296.56	11.48
Nebraska .....	10,791,615.61	1,209,242.01	11.21
Vermont .....	3,600,827.80	396,178.72	11.00
Kentucky .....	28,574,914.55	2,398,771.01	8.40
Louisiana .....	20,427,382.79	1,568,478.76	7.68
Colorado .....	15,228,037.25	1,136,038.21	7.46
Minnesota .....	31,586,633.59	2,175,051.02	6.89
New Hampshire .....	5,805,346.34	386,808.60	6.66
Indiana .....	45,767,607.75	3,017,206.33	6.59
Maine .....	13,945,902.74	854,541.35	6.13
Virginia .....	45,991,886.98	2,794,659.45	6.08
Florida .....	15,819,827.98	955,463.95	6.04
Missouri .....	68,794,487.92	4,144,134.74	6.02
Wisconsin .....	40,448,722.69	2,136,407.65	5.28
Washington .....	19,006,008.79	957,172.44	5.04
Delaware .....	10,805,101.68	495,940.38	4.59
West Virginia .....	19,895,467.21	903,086.40	4.54
Ohio .....	153,524,832.76	4,266,891.85	2.78
Illinois .....	214,840,722.14	5,583,318.93	2.55
California .....	129,026,453.85	3,007,775.11	2.33
Maryland .....	34,349,218.27	767,684.19	2.23
Rhode Island .....	20,239,353.73	329,275.61	1.63
North Carolina .....	157,973,393.95	1,960,496.10	1.24
Michigan .....	221,380,005.15	2,721,944.20	1.23
Massachusetts .....	138,681,654.73	1,169,160.60	.84
New York .....	690,415,425.07	4,752,254.59	.69
Pennsylvania .....	269,688,619.61	1,839,913.83	.68
New Jersey .....	112,260,046.96	652,776.46	.58
Connecticut .....	37,006,532.52	201,668.36	.54
Total .....	\$2,761,850,094.22	\$92,575,834.30	

The former comparison and the latter both show such manifest unfairness and inequalities among the states as to make the system indefensible in practice, as well as on principle.

#### COMPARISONS OF FEDERAL TAXES PAID WITH FEDERAL AID RECEIVED

Nevada, North Dakota and South Dakota head the list. Connecticut, New Jersey and Pennsylvania bring up the rear. The comparison between these two sets of three states each is startling:

	Fed. Taxes	Inc. Taxes	Fed. Aid	Per Cent Fed. Taxes Returned	Per Cent Inc. Taxes Returned
Nevada .....	\$761,499	\$581,492	\$1,845,945	242.41	317.45
North Dakota....	1,282,838	771,387	1,487,858	115.98	192.88
South Dakota ....	1,951,248	1,169,750	2,094,133	107.32	179.02
Pennsylvania ....	269,688,619	198,270,944	1,839,913	.68	.93
New Jersey.....	112,260,046	69,620,079	652,776	.58	.94
Connecticut .....	37,006,532	26,901,779	201,668	.54	.75

Is there not, indeed *must* there not be something vicious about a system under which from one set of three states one state gets back in Federal aid from the government *over 300 per cent* and the other two *nearly 200 per cent* of the whole amount they, respectively, pay the government in income taxes; when from another set of three states *not one gets back as much as 1 per cent* of the amount it pays the government either in income or in total Federal taxes?

Twenty-six states get back less than 10 per cent of what each pays in *total Federal taxes*. These states are:



Kentucky	Missouri	Rhode Island
Louisiana	Wisconsin	North Carolina
Colorado	Washington	Michigan
Minnesota	Delaware	Massachusetts
New Hampshire	West Virginia	New York
Indiana	Ohio	Pennsylvania
Maine	Illinois	New Jersey
Virginia	California	Connecticut
Florida	Maryland	

The total Federal taxes paid by all the forty-eight states is \$2,761,850,094. Of that amount the above twenty-six states pay \$2,561,483,587, or almost 93 per cent. The remaining twenty-two states pay \$200,366,507, or slightly over 7 per cent.

Yet of the twenty-six states which together pay *practically 93 per cent* of these total Federal taxes, not one gets back in Federal aid *as much as 10 per cent* of what it pays; but of the twenty-two states which together pay *only 7 per cent* of these Federal taxes, one gets back in Federal aid *242 per cent* of what it pays; two get back *over 100 per cent*; two from 64 to almost 70 per cent; two slightly less than 50 per cent; two from 33 to almost 38 per cent; three from 20 to almost 27 per cent; and ten from 11 to almost 20 per cent. On what possible basis of reason can such discriminations be justified?

Twenty states get back less than 10 per cent of what each pays in *income taxes*. These states are:

Colorado	West Virginia	Rhode Island
New Hampshire	Delaware	Massachusetts
Maine	Ohio	New Jersey
Missouri	Illinois	New York
Minnesota	California	Pennsylvania
Wisconsin	Maryland	Connecticut
Washington	Michigan	

The total income taxes paid by all forty-eight states is \$1,812,383,342. Of that amount the above twenty

states pay \$1,564,298,652, or over 86 per cent. The remaining twenty-eight states pay \$248,084,690, or 13 per cent.

Yet of the twenty states which together pay *over 86 per cent* of these income taxes, not one gets back in Federal aid *as much as 10 per cent* of what it pays; but of the twenty-eight states which together pay *only 13 per cent* of these income taxes, one gets back in Federal aid *317 per cent* of what it pays; two get back nearly *200 per cent*; three from 75 to almost 89 per cent; one over 66 per cent; two nearly 50 per cent; two from 32 to almost 37 per cent; four from 21 to almost 25 per cent; five nearly 20 per cent; three over 16 per cent; and five from 10 to almost 14 per cent. Is there any possible rational basis to justify such discriminations?

#### ARGUMENT THAT THE TARIFF JUSTIFIES FEDERAL AID ANSWERED

This brings me to the two principal arguments in favor of the system, both of them necessarily based on practical considerations, because, as I have tried to show, there is no argument based on principle which can be advanced.

The first relates to the tariff. This, it is said, directly benefits the prosperous industrial east by favoring manufactures, and adds to the burdens of the west, thus justifying Federal subsidies to the west as a sort of "evening up" process.

Now aside from the fact that two wrongs cannot make a right, the tariff question is a great political issue of itself, big, complicated and far reaching. The particular states it may be said to favor at the expense of others, depend entirely upon the provisions of the particular tariff which is in effect at any particular time.

But assuming that the tariff laws during recent years have favored the industrial and urban east at the ex-

pense of the agricultural and rural west, still this fact could not justify any system of Federal subsidies to the states except one worked out on a basis which would make up to the west for this discrimination.

The fifty-fifty system of Federal aid is worked out with no such purpose in mind. The allotments under it, as provided by the various acts, are based on rural, urban and total populations and on road mileage, and include also flat appropriations, and they are made to the states without any regard at all to the question whether or not any particular state has been favored or injured by any particular tariff.

It is simply not possible to check tariff results in the states against Federal Aid results, and say that benefits to individual states from Federal aid make up or tend to make up for detriments to those states from the tariff. The two things are entirely disconnected, and each must be treated separately.

Moreover, even if the fifty-fifty Federal aid system were calculated to "even up" tariff discriminations, that would not justify the Federal control over local activities which is inherent in it, and which is the vicious part of it. If only that feature alone could be ended, it would be a long step back toward the safe moorings of the Constitution.

Along similar lines it has been argued that the rivers and harbors bills, and to an extent the public building appropriations, favor the industrial and urban centers, and that the Federal aid system makes up for this to the agricultural and rural states. But the answer is substantially the same. There is no relation between these measures.

#### ARGUMENT THAT THE TAX EXEMPT FEDERAL DOMAINS JUSTIFY FEDERAL AID ANSWERED

The second argument of a practical character sounds more plausible, and needs to be refuted in a practical

way. So far as I know the facts necessary to refute it, and which do refute it, have not been presented before.

The argument is this: Those western states which are mainly benefitted by the fifty-fifty system, contain most of the public domain of the country, and these great areas of land, being owned by the Federal government, are not subject to state taxation. Their value, however, is greatly enhanced by the local improvements, such as roads and schools, which the states build and which their taxpayers pay for.

These states, therefore, contend that it is not fair for the Federal government to reap the benefit of these local improvements, and not bear its share of their cost, as all taxable landowners are required to do. They claim that as the government does not contribute through the payment of taxes and assessments to these improvements which enhance the value of its own domain, it ought in fairness to contribute through Federal aid.

But as an argument for the fifty-fifty system this is entirely misleading, because it disregards the fact that the government already pays the states in which the public domain is located part of the revenues from the public domain which is within their respective borders, and that these payments are undoubtedly greater than the states receiving them would secure from the government if the latter held the domain as a taxable landowner.

These payments are made principally under two acts.

The first is the National Forest Fund Act of March 4, 1907, as amended by subsequent legislation, under which 25 per cent of the gross revenues from timber sales, live stock privileges and other uses of the forest reserves goes back to the states where the reserves are located for their schools and roads. An additional 10 per cent is appropriated for forest roads and trails.

The second is the Mineral and Oil Leasing Act of February 25, 1920, under which  $37\frac{1}{2}$  per cent of the bonuses and royalties from oil wells and mineral re-

sources on public lands goes back to the states where the same are located for their schools and roads.

Neither of these acts requires the states to put up any of their own money, nor does the receipt by the states of these subsidies involve control by the Federal government over the expenditure of the funds upon the local roads and schools to which they are dedicated. This vicious characteristics of Federal aid under the fifty-fifty system is not present in this legislation. The subsidies are simply straight payments.

These subsidies, as will be seen, aggregated for the fiscal year ending June 30, 1924, \$16,136,464, and the states which receive the greater portion of this sum, and in which the public domain is principally located, are the following eleven:

Arizona .....	\$573,242.10
California .....	2,124,345.83
Colorado .....	628,238.58
Idaho .....	1,667,665.22
Montana .....	1,125,221.82
Nevada .....	191,502.25
New Mexico .....	306,723.28
Oregon .....	1,521,696.71
Utah .....	490,179.01
Washington .....	863,387.03
Wyoming .....	5,143,434.46
<hr/>	
\$14,635,636.29	

Of the other thirty-seven states, Delaware, Illinois, Indiana, Iowa, Kansas, Kentucky, Mississippi and Missouri receive nothing at all from this source, so that the balance of \$1,500,827.71 of these subsidies is divided among the remaining twenty-nine states.

Of these, the states of Connecticut, Georgia, Louisiana, Maryland, Massachusetts, Michigan, Nebraska, New Jersey, New York, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Texas, Ver-

mont, West Virginia and Wisconsin all receive less, and in most cases considerably less, than \$25,000 each.

The above eleven states which receive an aggregate of \$14,635,636, or over 90 per cent of the total, are the only states which could possibly be heard to argue that they should have Federal help to compensate them for the non-taxable public domain which is within their borders. The other states have too little of it to really count.

Let us now see what these eleven states actually receive from these two straight Federal subsidies on the basis of the income taxes and of the total Federal taxes which they pay.

	Total Fed. Taxes Paid	Income Taxes Paid	Fed. Payments Received	Percentage of Fed. Taxes to Fed. Payments	Per Cent of In- come Taxes to Fed. Payments
Wyoming ....	\$2,088,353	\$1,595,540	\$5,143,434	246.29	322.36
Idaho .....	1,976,084	1,271,318	1,667,665	84.39	131.18
Montana .....	2,958,039	2,060,349	1,125,221	38.04	54.61
New Mexico .	1,131,323	890,835	306,723	27.11	34.43
Arizona .....	2,131,228	1,591,667	573,242	26.89	36.01
Nevada .....	761,499	581,492	191,502	25.14	32.93
Oregon .....	10,500,237	8,242,145	1,521,696	14.49	18.46
Utah .....	4,087,186	2,937,172	490,179	11.99	16.68
Washington ..	19,006,008	14,723,370	863,387	4.54	5.86
Colorado ....	15,228,037	11,543,616	628,238	4.12	5.44
California ...	129,026,453	92,401,441	2,124,345	1.64	2.29
	<hr/> \$188,894,447	<hr/> \$137,838,945	<hr/> \$14,635,632		

Now it ought to be obvious that a state which receives a Federal subsidy of *more than 30 per cent of all the income taxes it pays and more than 25 per cent of the total Federal taxes it pays*, is better compensated in this way for its non-taxable Federal lands than it would be

if it collected simply property taxes from them. Surely the presence of the Federal domain should not be used by such states to secure *still more money* from the government.

This disposes of Wyoming, Idaho, Montana, New Mexico, Arizona and Nevada. Each receives from its Federal domain more than 30 per cent of all the income taxes it pays and more than 25 per cent of all it pays in Federal taxes of every kind. That is by way of a grant to these states in lieu of taxes, and it is so generous as to leave no room for them to claim an *additional* subsidy through the fifty-fifty system because of the *same* non-taxable property. The government has already paid them richly for that.

It also seems clear that at least two more of these states, California and Washington, could hardly justify more than the subsidies they already get on account of their Federal domain.

Washington's ratio of exempt to taxed property, is only 15.05 per cent and California's is 13.31 per cent. Numerous states which get hardly any subsidy at all on account of Federal domain have a ratio of exempt to taxed property practically as high or higher—for example, Oklahoma, North Dakota, Massachusetts, Connecticut, New Hampshire, New York, Maryland, Virginia, Rhode Island, Louisiana, Delaware, Pennsylvania and Vermont.

California and Washington are rich states. Each is away above the average in its percentage of per capita taxable property and in its percentage of per capita taxable income. They receive a subsidy from their non-taxable Federal domain greater than other states, whose ratio of exempt to taxable property is practically the same. Washington gets nearly \$1,000,000 and California over \$2,000,000. How can they justify an *additional* subsidy under the fifty-fifty system because of the *same*



non-taxable property, for which the government has already paid them so generously?

This only leaves Oregon, Utah and Colorado. The first two receive fairly large returns from their Federal domain as it is, the former over 18 per cent and the latter 16 per cent of all the income taxes they pay, which surely ought to be enough.

Colorado's return from its Federal domain is less—5.44 per cent of the income taxes it pays—but even if we were to assume that all three of these states need to be compensated for their loss in taxes due to their Federal domain, and that this justified some special help to them, still this would not be an argument to justify the fifty-fifty system for all the other forty-five states of the country, which either get a sufficiency from their own Federal domain or to which this argument does not apply at all, because they have practically no Federal domain.

Indeed it must be clear that even if any state ought to receive more compensation from the Federal government on account of its tax exempt Federal domain than it already does receive under the two subsidies just discussed, then this should be by an increase in such state's share of the revenues from its public domain, or by some form of straight appropriation. Most certainly such need, if it exists anywhere, ought not to be used as a means of fastening upon the entire country the governmental unsoundness and the rank discriminations involved in the fifty-fifty Federal aid system.

The straight subsidies paid to the states within which the public domain is located are not charged against the general treasury, as the fifty-fifty Federal aid is, but are taken from the revenues which the public domain yields. Nevertheless it is interesting to see what is the relationship between the Federal taxes paid by the states to the total subsidies, both straight and fifty-fifty, received by each. The same eight states head the list and the same five states bring up the rear. The comparisons follow:

	Federal Taxes	Income Taxes	Total Subsidies	Per Cent Fed. Taxes Returned	Per Cent Inc. Taxes Returned
Wyoming ....	\$2,088,353	\$1,595,540	\$6,491,285	310.83	406.84
Nevada .....	761,499	581,492	2,037,448	267.56	350.38
Idaho .....	1,976,084	1,271,318	2,623,303	132.75	206.35
North Dakota.	1,282,838	771,387	1,491,829	116.29	193.40
South Dakota.	1,951,248	1,169,750	2,193,693	112.43	187.54
New Mexico .	1,131,323	890,835	1,093,894	96.69	123.91
Arizona .....	2,131,228	1,591,667	1,633,762	76.65	102.64
Montana .....	2,958,039	2,060,349	2,128,860	71.97	103.33
Massachusetts	138,681,654	109,857,344	1,177,560	.85	1.07
New York....	690,415,425	506,593,933	4,774,294	.69	.94
Pennsylvania .	269,688,619	198,270,944	1,856,084	.69	.94
New Jersey...	112,260,046	69,620,079	657,826	.59	.94
Connecticut ..	37,006,532	26,901,779	204,818	.55	.76

Here is an extraordinary situation. Eight states get back through both forms of subsidy amounts ranging from *over 100 per cent to over 400 per cent* of all the income taxes their people pay. And five states only get back amounts ranging from slightly over 1 *per cent down to  $\frac{3}{4}$  of 1 per cent* of what their people pay!

Twenty-five states get back through both kinds of subsidy *less than 10 per cent* of what they pay, respectively, in total Federal taxes. Of the total amount of Federal taxes paid by all the forty-eight states, these twenty-five states pay *over 90 per cent*. The remaining twenty-three states, which pay *less than 10 per cent* of the Federal taxes, receive in subsidies from 11 per cent *all the way up to over 300 per cent* of what they pay.

Seventeen states get back through both kinds of subsidy *less than 10 per cent* of what they pay, respectively, in income taxes. Of the total amount of income taxes paid by all the forty-eight states, these seventeen states pay *over 84 per cent*. The remaining thirty-one states, which pay *less than 10 per cent* of all the income taxes, receive in subsidies from over 10 per cent *all the way up to over 400 per cent* of what they pay.

These figures reflect the indefensible discriminations of the fifty-fifty system.

Think of Wyoming paying slightly over \$2,000,000 in total Federal taxes, of which almost \$1,600,000 is income taxes, and then receiving in Federal subsidies practically \$6,500,000—over four times as much as all the income taxes its people pay and over three times as much as the total Federal taxes they pay; and then think of New York, Pennsylvania, New Jersey and Connecticut each getting back less than 1 per cent of what their people pay!

### CONCLUSION

What excuse can there be for continuing any longer the fifty-fifty system of Federal aid?

It has already given the Federal government supervision over state roads, state agriculture, motherhood and infant hygiene and vocational education and rehabilitation. Its advocates are aiming at the schools now, and are asking \$100,000,000 a year from the Federal government for that. Its whole tendency is to destroy the principle of local self-government, and so the system is indefensible as a governmental policy in this country.

In actual operation the system is attended with the grossest inequalities and discriminations among the states, and yet the states which suffer most cannot withdraw from it, because their people would still be taxed to raise the subsidies which would go to the other states, and nothing at all would come back for them.

It is one of the most prolific feeders of waste and incompetence in the country today, because it is directly responsible for a large part of the bureaucratic government which has gripped Washington and which has caused the personnel of Federal bureaus to grow 25 per cent since 1914—the year the system began—and five times faster than the population of the country.

No argument can be made for it except that the states

which other states carry want the money, and yet those are the very states which receive generous subsidies anyhow. They simply want more.

The American people have not lost the industry and the initiative and the grit which have always characterized them. They have not lost their ability to solve their local wants themselves. The states can still function in the way they were intended to function under the Constitution. There is no need of a subterfuge whereby the government gathers in control over local purposes by giving back to the states money which it taxed the people of the states to get.

The system ought to be abolished, root and branch. The \$94,000,000 which it entails ought to be stricken from the Federal budget, and this money ought to be left in the states for the states to use for their own local needs and purposes, in such manner as their people will.

## REORGANIZATION OF GOVERNMENT<sup>1</sup>

Over many years our people have been striving to better the Federal administration. We have succeeded in two major steps; we still have a third equally important and perhaps more difficult one to accomplish. The first step was the establishment of government employment based upon merit; the second was the establishment of adequate control of appropriations through the budget system. There still remains the third and even more important step to relieve the taxpayer of a greater but more obscure waste—that resulting from faulty organization of administrative functions. And the first two steps will never reach the full realization without the third.

In recent years, under the leadership of the President and with the cooperation of Congress, we have been suc-

<sup>1</sup> By Herbert Hoover, Secretary of Commerce. An address before the Chamber of Commerce of the United States, May 21, 1925.

cessfully slashing Federal expenditures by the elimination of extravagances and unnecessary personnel. But for lack of legislative authority we have not been able to reach into what I believe is an even larger waste and larger drain on the taxpayer than extravagance and the inflation of payrolls—the waste which arises from the swamp of bad organization.

As is said in the maiden speech of every constitutional orator, our government is divided into the legislative, judicial and executive branches. When our forefathers conceived this great plan they also conceived a wide difference between legislative and judicial decisions on one hand and executive decisions on the other. They felt that legislation required the meeting of scores of minds of equal authority, and that judicial decision likewise required the meeting of many minds through appeals and final decision by a whole bench of judges; but they were no less emphatic that administration must be in single headed responsibility. And in one hundred and fifty years of the highest development of skill in organization of big industry and commerce, we have right down to today proved the soundness of this principle, namely, many minds for legislative, judicial and advisory decisions, but a single mind for executive authority. Yet in government we have been busy for the last century violating these primary principles of good organization.

Moreover when Hamilton laid out the scheme of executive departments he placed the different functions of administration as nearly as might be into groups of the same general major purpose under single headed responsibility. But ever since his time we have been busy dividing responsibility by scattering services directed to substantially the same major purpose over many different executive departments and bureaus. Our governmental machinery has just grown. Whenever a new activity has been authorized or a new bureau created it has been thrown wherever it happened to be most convenient

at the moment or wherever its sponsors thought it would have the most friendly treatment, without any thought of a sound basis of organization, and we have shunted along misfit after misfit from one generation to another.

On the executive side of the Federal government we have grown to have more than two hundred different bureaus, boards and commissions with a total of five hundred and fifty thousand employees. For the most part they have been thrown hodge podge into ten different executive departments, under cabinet officers. But there are more than forty independent establishments either directly under the President or directly under Congress.

As these two hundred bureaus and agencies are now grouped and organized there are two primary streams of confusion and waste. There is a confusion of basic principles; there is a grouping of Federal bureaus which divides responsibility. There consequently arises a lack of definite national policies and direct wastes arise from overlap and conflict. Indirectly large costs are imposed upon citizens by this scattering of functions, and I may add, by the undue complexity of our laws and regulations of independent agencies. There are too many floating islands in this dismal swamp. They are technically anchored to the President, but really responsible to nobody. With all this division of authority there continues and multiplies a self-propelled urge for expansion of Federal activities in every direction.

#### CONFUSION OF BASIC PRINCIPLES

It is not my purpose to deal primarily with the legislative and judicial arms of the government. I am directing my remarks to the executive side only. With the growing complexity of government problems it has been necessary for Congress to delegate to the executive side many secondary legislative functions in the making of regulations, and many secondary judicial functions in the



enforcement of them. That is the so-called administrative law. And there has been the crudest mixing of these semi-legislative and semi-judicial functions with purely executive functions. These semi-judicial and semi-legislative duties are frequently entrusted to single officers, while purely administrative functions are often carried on by boards. All of this is exactly the reverse of the basic principles of sound administration. Boards and commissions are soundly adapted to the deliberate processes necessary to semi-judicial and semi-legislative and advisory functions, but they are absolutely hopeless where decisive administrative action is necessary. And likewise most of such functions should not be entrusted to a single mind. There is not a single successful business organization in the country that confuses such functions the way we do in government.

The Shipping Board—to cite a glaring case—was originally created as a body to regulate rates and abolish discrimination in ocean-going traffic. These are semi-judicial functions that quite properly were entrusted to a board. Political jealousies and sectional jealousies, however, resulted in a bi-partisan body selected from different parts of the country although it was to perform an expert judicial function. Then this structure was suddenly loaded with the most difficult of administrative jobs—the actual construction and operation of the greatest single merchant fleet in history. The losses and waste which have resulted from this blunder of assigning executive and administrative functions to the joint and equal minds of a wrongly constructed semi-judicial body have amounted to perhaps a few hundred millions out of the three billion we have lost on shipping, but beyond this the impossibility of a continuous merchant marine policy has worked great losses upon our privately owned merchant marine. Nor can we properly blame the individual member of the Shipping Board. Not even two geniuses of equal authority could administer a competi-



tive business—let alone seven. There are other breeds of this same sort of confusion between individual and joint responsibility. The Federal Board for Vocational Education, the Federal Power Commission and other agencies likewise are mixed functions.

This same chaos of function is carried into other directions where administrative or executive officials are given these semi-judicial and semi-legislative authorities. The Secretary of Agriculture has been loaded with powers of a semi-legislative and judicial character in the administration of the stockyards and commodity exchanges. The Secretary of Commerce has semi-legislative and semi-judicial powers over navigation and some branches of communications, and the Secretary of Labor has certainly a judicial authority over matters of immigration. Nor do these confusing functions solely reside in cabinet officers; many bureau heads have such powers. The responsibilities in decisions under these powers are at least as important as those of Federal courts, with this important difference, however, that while there is theoretical appeal to the courts in most cases, yet practically most decisions are final. Worst of all there are none of the safeguards as to the right of individuals in the determination of questions submitted such as are in our courts. Duties of this semi-legislative and semi-judicial character should not be imposed upon administrative officials. In those matters where they involve semi-legislative action they should not even be conferred upon a judge, much less upon executive officials. No individual should be at the same time legislator, policeman, prosecutor, judge and jury. Yet in many instances he is. We arrive at judgments the best we can in old Kadi fashion and the culprit usually knuckles down quietly because he feels we might look for him again if he protested. The dangers of oppression in these matters are not merely a theory—they are a fact. All these confusions of functions were perhaps of less importance in days gone by

when our population was smaller and higher officials were less pressed with administrative work.

Every single department, bureau and board in the entire government should be placed upon the operating table and a cleancut separation established between semi-judicial and semi-legislative functions on the one hand, and of administration on the other. The former rightly belongs to boards or commissions, the latter to individuals. For instance, the semi-judicial and semi-legislative functions arising from the navigation laws should be transferred to a properly constituted Shipping Board, leaving matters of administration of such decisions to the Department of Commerce.

#### DIVISION OF AUTHORITY IN ADMINISTRATIVE AGENCIES

Our other greatest weakness in organization is the division of authority over services directed to the same major purpose by scattering them through unrelated groups. Needless to say some of the ten executive departments are fairly homogeneously devoted to a particular major purpose—notably the Department of Justice, the Navy Department, the State Department, the Department of Agriculture, and the Post Office Department. But all the others, and even some of these contain functions that should be transferred elsewhere. And there is hardly a department that should not, when it gives up these functions which are without relation to its major purpose, receive in exchange functions which properly belong in its jurisdiction but which are now performed by other departments.

To illustrate my point, I have made a partial collection of misfits and in so doing I have taken no account of either incidental functions or semi-legislative or semi-judicial agencies, except so far as they have administrative functions.

	Number of Bureaus or Agencies	Number of Departments or Independent Agencies in Which They Are Located
Public Works Construction .....	14	9
Conservation of National Resources .....	8	5
Direct Aids to Industry .....	5	2
Direct Aids to Merchant Marine .....	14	6
Direct Aids to Education .....	6	3
Direct Aids to Veterans .....	4	4
Government of Territories and Dependencies .....	4	3
Public Health .....	4	2
Purchase of \$250,000,000 of supplies annually ..	In every bureau of the Government	

It is not necessary that each of these groups should become a whole executive department, each under a cabinet officer; but it is entirely feasible to place each one of them under the supervision of a special assistant secretary, and if we were truly intelligent we would class him as an expert and outside selection on political grounds. It is entirely secondary what department these groups are in. The big thing is to bring these kindred agencies together under one leadership so that their overlapping edges can be clipped and their fights stopped. No one familiar with the internal workings of the departments will deny the direct waste which comes from overlap and friction as the result of the present lack of coordination of activities. Coordination is feasible when some one person is responsible; with divided authority among the different branches of government it is a hypothesis that evaporated soon after the perennial conferences of cabinet officers on the subject. It all costs some-

body money. One of the favorite indoor sports of our newspaper correspondents is to ventilate these conflicts.

The divided responsibility with absence of centralized authority prevents the constructive and consistent development of broad national policies in these special branches of governmental activity, for there is by necessity of this division constant conflict of view within the government itself. Under the present system we have different bureau policies, department policies, board policies, and commission policies. We have a bundle of divergent ideas without focus; lumber piled together does not make a house. The treatment of our national resources furnishes a good instance. If anything is certain, it is that the government should have a continuous, definite, and consistent policy directed to intelligent conservation and use of national resources. But it can have no such policy so long as responsibility is split up among half a dozen different departments. The recent occurrences in oil leases are a fair example of what may happen by the lack of singleheaded responsibility in such matters. No policy of real guardianship of our reserve resources will exist until we put all conservation business in the hands of an Under Secretary for Conservation, with the spotlight of public opinion continuously upon him.

The same is true of our deplorable lack of a definite and organized merchant marine policy—a thing which has caused the waste of a few hundreds of million dollars which might have been saved had the government from the beginning concentrated all administrative matters relating to shipping under a single responsible Under Secretary for Merchant Marine. I may remark incidentally that I would not place the job of liquidating the war fleet under such an official. That is a temporary job requiring a specialist.

In our public works there has been no concept of the nation's priority needs or its needs as a whole, and enormous sums have been sunk upon many fruitless works

that got nowhere. It has been a question of satisfying the demands of a given community or a particular section with little thought to concerted development for the good of the nation as a whole. We have the same problems in public buildings.

The scattering of our government purchasing agencies and the method of purchasing of government supplies result in such obvious losses as to require little discussion. The government agencies compete with each other for commodities of the same kind.

The multiplication and scattering of the agencies which are supposed to attend to different aspects of the same problem or to further the same major purpose, imposes a heavy burden upon those who have dealings with the government. It costs somebody money. A bureau or function may be conducted economically enough so far as personnel and pencils are concerned, and without overlap or friction with its neighbors, and yet owing to the unnecessary complexity of the laws or regulations which it administers and the demands it makes upon the citizen, it imposes much needless expense upon the public. I need go no further than the income tax maze. Whole new professions of tax lawyers, tax experts, tax accountants, have grown up, which cost the citizen far more than it costs the government to collect the taxes. Nor am I here dealing with the economic waste imposed by our form of taxation. But the government officials cannot help it. They must execute the laws as they stand. I marvel daily at the kindly temper of our citizens under these strains.

Under existing hodge podge arrangement, the citizen is driven from pillar to post among the bureaus, seeking information he wants, settling the demands upon him or determining the regulations by which he is required to conduct his business. I have daily evidence in the Department of Commerce of all these forces. Assistance to and regulation of navigation is not by any means one of

the principal functions of our government, but it must be a sore trial to the hardy mariner. The delay of ships, the time lost to masters and officers as they are shuttled from one office to another, or as one official after another operates on him from the fourteen agencies in six different departments which have to do with shipping must sorely try his temper. Perhaps hardships at sea make him immune to trouble ashore. But it is a great burden on the merchant marine.

Again there are a great many bureaus at Washington which are given to important economic research. The boundary lines which separate these bureaus, one from another, are necessarily indeterminate. The business man who is accustomed to receive a bombardment of questionnaires from these establishments has good reason to dread the extension of Federal encroachment upon business. He would have much less cause for complaining if these government activities were grouped in such fashion that these matters fell under the control of fewer superior officials. If investigation of the same general character had been concentrated, one of the recent widespread questionnaires would never have been sent out because so far as the information desired could ever be effectively collected it was already in the hands of the government. In this case if replies were complete enough to be of any value a low estimate of the cost to the citizen of making the returns would be \$50,000,000 in bookkeeping alone. One firm stated that a reply would cost them \$20,000, a country doctor complained it would cost him \$100. This case illustrated another point. The questionnaire carried every earmark of peremptory demand, yet as a matter of fact no citizen was required by law to furnish the information asked for. Such activities are a definite form of oppression. They lend themselves to doubtful constitutional practices of search and inquiry.

## THE INDEPENDENT AGENCIES

The forty governmental agencies which are now supposed to function directly under the President present another problem. Here we have four breeds which might be classified according to the functions they perform: The semi-judicial, the semi-legislative, the service bureaus to all departments, and the straight administrative. Often enough they are mixed. They are supposed to act under the direct supervision of the President. But it is preposterous to expect that with his multitude of higher obligations the President can give them anything like adequate supervision. As a matter of fact, these independent establishments conduct their activities with very little supervision or coordination. The last group, the straight administrative, expend nearly half a billion a year—as much as the total of five of the departments under cabinet officers. If for no other reason, this group should be placed directly in the departments in order that the President may exercise through his cabinet the guidance and control of the administrative arm of the government. And the President already overworked in major policies must be relieved of detail.

The largest of the independent establishments is, of course, the Veterans Bureau. It is my belief that if this bureau had been directly responsible to a cabinet officer there would have been, as in the case of other departmental bureaus, so many more safeguards in management as to have prevented the frauds which have been exposed in the courts in the recent history of that bureau. The government is fortunate, indeed, when it obtains so able and self-sacrificing a public servant as the present director. He administers a business as big as the largest of insurance companies, receives the salary equal to one of their head clerks, and has none of the compensating glory which is supposed to come to cabinet officers.



## CENTRALIZATION OF GOVERNMENT

No one doubts that for many years there has been a steady tide of Federal encroachments into state authority—and beyond this a steady thrust of the arm of Federal government into our private business. Some of it has been necessary. But many of the functions now performed by the Federal government would much better be left to the states. They are now so securely entrenched as to make decentralization a very difficult job.

But if we examined these encroachments we would find some considerable part of it takes root in the very lack of organization in our Federal government. There is an impelling urge in most of these agencies which pushes them on to extend some fraction of their functions into all sorts of activities which the Federal government should leave to other quarters.

Every well-balanced citizen knows of something in this world that ought to be regulated that is not being regulated. Every agency of the Federal government knows this also, but the difference is that every government agency is under constant pressure, or sometimes is anxious, to read and expand its power further than was originally contemplated. When any particular theme is large in the national mind, every bureau that has any relationship to the problem or thinks it can get some appropriation for it immediately rushes in that direction. They compete with each other, tread on each other's toes, fight each other, but the net effect is expansion. Much of it originates from worthy zeal. And it costs somebody money. The very scattering of government agencies gives impetus to this tendency. There would be far less of this if there were concentrated authority over related things.

The natural tendency of most healthy things is to grow. There are, of course, government bureaus which should grow, and as the country gets bigger and more

complicated they must grow. But they should grow in directions approved by the whole people, and in line with fundamental national policies—not as scattered entities in a conglomerate bureaucracy. And do not think that the President and cabinet officers are negligent of effort to curtail it. I do not know how to compute the time and thought taken up by interdepartmental conferences, interdepartmental committees, and cabinet discussions over trying to make things coordinate that need no policy of coordination if they had single-headed direction.

The border line around proper extension of Federal authority is not theoretical. It permits of no philosophic solution. It must be handled problem by problem, with always an extreme leaning to local and private responsibility. The only justification of expansion of authority by the Federal government is in the cases where constitutional inhibitions prevent state solution, or where overpowering and destructive action would result to local communities but for Federal control. We had better suffer from some slackness in state and local government, and even some abuse, than to undermine the foundation of self government. Among the real safe-guards against continued expansion, concentration of administrative responsibility is just as important as vigilance on the part of the public and a willingness on the part of the states to assume their proper responsibilities.

There is one side of the Federal government that is certainly not sufficiently expanded today—that is scientific and economic research and the promotion of public interest by voluntary cooperation with the community at large. This is never an encroachment upon the rights of individuals. It can truly be better organized but today the whole of our activities in these directions involve less than 3 per cent of our Federal budget—and they bring returns to the taxpayer not in few per cent but in hundreds of per cent every year.

There is often complaint of the red tape and unnec-

essary motion in the government, but a certain amount of red tape in the public service, is as a matter of fact, a necessary thing. Unless the public is to be subjected to arbitrary action, unless the way is to be opened to manipulation and fraud, much of the government's administrative work must be completely surrounded with checks and balances. When a business man takes a wrong course he pays for it in dollars; when government officials take a wrong course the people pay for it in injustice and oppression and taxes. From this phase of the governmental situation there is no full escape so long as human beings are fallible. This very fact is the weightiest of all reasons for limiting the functions of the government to those things which only the government is in a position to do—those things which cannot be reached by private enterprise, or accomplished directly by our people.

#### IN GENERAL

I wish to repeat that the faults of organization are not a matter of the taxpayers' small change. They form a total of waste, which, considering the indirect results, runs into high figures. The waste from bad organization is not to be measured in loss of dollars of congressional appropriations alone. That is bad enough, but still larger is the indirect loss in the unnecessary costs they impose on the citizen. All these weaknesses have been multiplied by the growth of the country, the enlargement of its problems and the burdens from the war.

We do not need to approach administrative reorganization with meticulous extremes of logic. We should not assume that all government agencies using the same mechanical appliances ought to be grouped together or that all those dealing with similar subjects should be consolidated. It would not be sound organization to put all the stenographers, or all the engineers, or all the statisticians, or all the aeroplanes in the same department.

These are merely instruments for the accomplishment of major objectives which may be quite different. The Tariff Commission, the Treasury Department, and the Department of Commerce, for example, all employ tariff experts, but to accomplish major purposes which are widely different.

What we need is three primary reforms; first, to group together all agencies having the same predominant major purpose under the same administrative supervision; second, to separate the semi-judicial and the semi-legislative and advisory functions from the administrative functions placing the former under joint minds, the latter under single responsibility, and third, we should relieve the President of a vast amount of direct administrative labor.

Every President from Roosevelt to Coolidge has urged upon Congress a reorganization of the executive arm of the government, commissions have been appointed, congressional committees have investigated, reports have been made, confirming all this. Cabinet officers express their feelings in spirited annual reports with a circulation of a few hundred copies. More than once a complete program of reorganization has been formulated, and put forward as a basis for general consideration.

But practically every single item in such a program has invariably met with opposition of some vested official, or it has disturbed some vested habit, and offended some organized minority. It has aroused the paid propagandists. All these vested officials, vested habits, organized propaganda groups, are in favor of every item of reorganization except that which affects the bureau or the activity in which they are specially interested. No proposed change is so unimportant that it is not bitterly opposed by someone. In the aggregate, these directors of vested habits surround Congress with a confusing fog of opposition. Meantime the inchoate voice of the public gets nowhere but to swear at "bureaucracy."

Nor will we ever attain reorganization until Congress will give actual authority to the President or some board, if you will, or a committee of its own members to do it. It is of no purpose to investigate again and report. We have had years of investigation and every investigation has resulted in some recommended action. Congressional committees have for many sessions and even so late as the last session reported out important recommendations. What is needed is the actual delegation of authority to act. Congress courageously removed the civil service from politics; created the budget, it established the classification. The remaining great step is to authorize somebody to reorganize the administrative arm of the government.

Nor is Congress to be blamed for this situation, as it is impossible for such an overworked body to study directly and act upon the overwhelming detail involved. Nor is it possible for a great body like this to determine the right and wrong of a thousand clamors.

I do not expect that the Federal government will ever be a model of organization, but I have aspirations to see it improve.

### BRIEF EXCERPTS

Only overwhelming importance should warrant adding to federal power.—*Harry P. Judson. Our Federal Republic. p. 121.*

A federation of states implies a large measure of home rule for each state.—*Harry P. Judson. Our Federal Republic. p. 9.*

Centralize government and men begin to lose interest in it.—*Governor Albert C. Ritchie. Address at the Iroquois Club. p. 6.*

The errors and usurpations of the Supreme Court of the United States will be uncontrollable and remedyless.—*Federalist*. No. 81.

It is doubtful whether the failure of state and local officers is, in the long run, any greater than would be the failure of federal officers.—*David Kinley*. *School and Society*. 14:590. December 24, 1921.

Theodore Roosevelt's new nationalism is the most dangerous program any political leader has laid before the American public since the civil war.—*Jacob G. Schurman*. *Independent*. 69:1052. November 10, 1910.

The Federal Government within its proper sphere has already more to do than it can well accomplish. Both the Executive and Congress are overburdened.—*Everett P. Wheeler*. *American Bar Association Journal*. 10:713. October, 1924.

State officials are too close to their creators to develop a bureaucracy. Everybody can easily know all about them. The force of public opinion can keep them in check.—*Governor Albert C. Ritchie*. *Address at the Boston City Club*. p. 16.

The federal judiciary, in this insidious work of suppressing the rights of the states, seldom makes a backward movement. Its operations may be compared to that mechanical contrivance called a ratchet.—*American Law Review*. 19:608. August, 1885.

It is essential in the life of our dual government that the power and functions of the state governments be maintained in all the fulness that they were intended to have by the framers of the constitution.—*William H. Taft*. *Popular Government*. p. 151.

The time has come to realize that we have gone far enough in the direction of a centralized federal bureaucracy at Washington. We need to cherish, and to cherish scrupulously, the local liberty of our states.—*Harry P. Judson. Our Federal Republic. p. 269.*

The railroads are for state's rights whenever they are fighting a federal law and for centralization whenever they are fighting a state law, but that they are always, in any case, for themselves and for their own interests.—*William J. Bryan. Reader. 9:463. April, 1907.*

Legislation depriving the states of regulative power over the railroads would practically obliterate state lines and would lead to a centralization which would threaten the very existence of our dual form of government.—*William J. Bryan. New Republic. 9:170. December 16, 1916.*

The constitution is illusively supposed to be the creation of the convention of 1787. After a hundred years of its existence and expansion, the major part of it is the creation of progressive judicial construction.—*Daniel L. Russell, Governor of North Carolina. Arena. 19:721. June, 1898.*

The greatest danger which threatens the American republic is the judicial usurpation of power. Since Judge Shiras, "between two days," changed his opinion upon the legality of the income tax, a great revolution has commenced.—*Camm Patterson. Virginia Law Register. 10:855. February, 1905.*

No assault upon the authority or contraction of the sphere of the state can be justified on the ground that it is necessary for the overthrow of monopolies. Federal remedies should supplement state remedies; they should



not be substituted for state remedies.—*William J. Bryan. Reader. 9:356. March, 1907.*

Instances are numerous where Congress has made laws for the accomplishment of ends for which the several states might have appropriately made provision. . . . Unless a halt is soon called state legislation will be completely shorn of important jurisdiction.—*Leslie M. Shaw. Current Issues. p. 9-11.*

This unnecessary increase of federal power and this failure of the states to assert their rights is resulting in dangerous centralization, in the breakdown of political fibre, and in the upbuilding of an unworkable and intolerable federal bureaucracy.—*Governor Albert C. Ritchie. Address at the Boston City Club. p. 14.*

Home rule is the most important issue before the people. This country is too big to be governed entirely from Washington by commissions and federal officials. The people will lose their political instincts if local matters are vested by the Constitution in the federal power.—*Philadelphia Record. July 10, 1924.*

Is there any demand for a surrender by the states of the powers reserved to them? On the contrary, every reason which existed one hundred and eighteen years ago exists now, and those reasons are even stronger than they formerly were, because of the increase in the area and population of the nation.—*William J. Bryan. Reader. 9:353. March, 1907.*

We have not only obsolete methods in all the departments, but we have in them duplication of bureau after bureau. . . . If I were a business man and could be permitted to do it, I would undertake to run this government for \$300,000,000. a year less than it is now run

for.—*Nelson W. Aldrich. Congressional Record.* 45: 2160-1. *February* 21, 1910.

The diversity of our divorce laws is perhaps the most notable illustration of what many people regard as the essential vice of federalist (sic) government. But is not this diversity and clash of state standards and interests a condition actually favorable to progress by making legislative experimentation possible? Centralization is no guarantee of increased efficiency or rapid progress in the direction of genuine reform.—*Nation.* 95:253. *September* 19, 1912.

In the creation and operation of great agencies of production abuses have arisen and will arise again; but the test of our whole economic and social system is in its capacity to cure its own abuses. If we are to be wholly dependent on government to cure them we shall by this very method have created an enlarged and deadening abuse through the clumsy and incapable handling of delicate economic forces.—*Herbert Hoover. English Review.* 39:796. *December*, 1924.

The maintenance inviolate of the rights of the states, and especially the right of each state to order and control its domestic institutions according to its own judgment exclusively, is essential to that balance of power on which the perfection and endurance of our political fabric depends, and we denounce the lawless invasion by armed forces of the soil of any state or territory, no matter under what pretext, as among the gravest of errors.—*National Platform of the Republican Party.* 1860.

Predatory interests can control a central government far from the source of power, much more easily than a multitude of local governmental organizations close to

their citizenship and fully controlled by the people. What Tom L. Johnson and his followers have accomplished in Cleveland, or Senator La Follette and his supporters have accomplished in Wisconsin, each for his own constituency, could never be accomplished for the whole nation by the national government.—*J. W. Bennett. Arena.* 41:272. *March*, 1909.

The states have, in one way or another, been shorn of much of the power originally regarded as reserved to them, and the process of centralization still goes merrily on,—now by the gradual process of judicial construction—now by leaps and bounds, as when the passage of the fourteenth amendment cuts off at one blow a large slice of state power, or makes its exercise subject to the control of the federal courts.—*R. C. Minor. Report of the twenty-third annual meeting of the Virginia State Bar Association.* 1911. *p.* 194.

Matters of ordinary private law, that which affects the every-day relations of life, as well as administrative law, changing of names, adoption, the coming of age, corporations, partnership, divorce, marriage, inheritance, privileges, exemptions, individual rights, rate of interest, municipal government, liens, and civil and criminal procedure, are matters that can vastly better be regulated by the community itself and controlled by the people who enact the law.—*C. A. H. Bartlett. Law Magazine and Review.* 32:398. *August*, 1907.

To turn over to a single legislative body the vast intricacies of social life throughout the country, that it may prepare a system applicable to all conditions,—to child labor in the south and in the tenements of New York, for example,—is not to hasten the adoption of better methods, but to place important governmental powers in the hands of those who can exercise them with

the greatest difficulty and with the least knowledge of local conditions.—*E. Parmalee Prentice. The Federal Power Over Carriers and Corporations. p. 228-9.*

No private business, however well capitalized, could survive thirty days under the same cumbersome, slipshod, inefficient, and hopelessly extravagant condition as that of the United States government. It would be easily possible to dispense with at least 100,000 unnecessary government employees, and save not only their annual salaries but also the overhead expense to house them and furnish them with the equipment and supplies with which to work, or rather, to put in their time.—*Martin L. Davey. Congressional Record. December 14, 1925.*

If we are going to preserve our federal system of government then we must maintain a definite and permanent division of powers between the national government and the states. . . . We must ever oppose centralization, for as its advocates admit, it means bureaucracy, and bureaucracy means an official class with divided responsibility and beyond the direct and speedy control of the people. Trial by jury becomes trial before a commission which is at once prosecutor, judge, and jury.—*Edward F. Barrett, Jr. New York State Women's Democratic News. 3:8. December, 1925.*

The national government has now assumed control of local and domestic affairs to such an extent that little is now left of state control. The national courts are gradually but surely ousting the jurisdiction of the state courts. The reason for state organization is gradually passing; state lines are being broken down and the American people compounded into one common mass. It is time to consider the wisdom of this advance and contemplate the end. What other goal is there than the ultimate destruction of the states?—*John D. Fletcher. Central Law Journal. 97:352. October 20, 1924.*

Until Congress has exhausted its present resources (the implied powers) there is no reason for employing other ways and means for securing regulation of the trusts. Yet, as we have said, the only way to exhaust the present resources is to pass laws designed as a means to the regulation of "commerce among the several states," and then if these laws are pronounced unconstitutional, to enact new laws—surely a tedious and somewhat dangerous method involving many possible upheavals in the financial world as well as general business depression.—*Warren Bigelow. Annals of the American Academy.* 26:664. November, 1905.

In the face of the difficulties already upon us, and destined to increase in number and gravity; we remain convinced of the necessity of autonomous local governments. An over-centralized government would break down of its own weight. It is almost impossible even now for Congress in well-nigh continuous session to keep up with its duties, and we can readily imagine what the future may have in store in legislative concerns. . . . If we did not have states we should speedily have to create them.—*Charles E. Hughes. Proceedings of the Thirtieth Annual Meeting of the New York State Bar Association.* 1916. p. 273.

Outside of the letter carriers and clerks and those directly concerned with the handling of the mails the civilian employees of the United States government include the largest number of loafers, time-killers, and buck passers that I have ever seen brought together under one banner. The existing conditions are a tragic perversion of the spirit and purpose of government. We should get rid of 100,000 or more of the tax-eating drones, co-ordinate the various activities of the government, eliminate senseless duplication of effort, and establish a reasonable basis of work and service.—*Martin L. Davey. New York Times.* February 8, 1926.

Constitutional prohibition has been adopted by the nation. It is the supreme law of the land. In plain speaking, there are conditions relating to its enforcement which savor of nation-wide scandal. It is the most demoralizing factor in our public life. Most of our people assumed that the adoption of the eighteenth amendment meant the elimination of the question from our politics. On the contrary, it has been so intensified as an issue that many voters are disposed to make all political decisions with reference to this single question. It is distracting the public mind and prejudicing the judgment of the electorate.—*Warren G. Harding. Address to Congress, December 8, 1922.*

Our federal system is the only form of popular government that would be possible in a country like ours, with an enormous territory and 100,000,000 population. Not only the mere geographical differences, but the differing interests of the people in different localities, require that a certain part of their government should be clearly within their own local control and not subject to the interference of people living at a great distance from them. But for this safety valve by which people of one state can have such state government as they choose, we should never be able to keep the union of all the people so harmonious as we now have.—*William H. Taft. Popular Government. p. 145.*

The growth of these independent establishments has been enormous, in the endeavor to carry federal regulation into the details of local life. In 1900 you had three independent establishments outside of the departments. They had an annual appropriation of \$820,000. In 1920 you had 33 independent establishments, for which you have appropriated more than \$650,000,000 annually, which is \$200,000,000 more annually than was required to operate all the departments of the federal government,

including their [sic] contribution to the District of Columbia, in 1900.—*James A. Emery. Hearings on the Child Labor Amendment before the Committee on the Judiciary of the House of Representatives. 1924. p. 209.*

It seems to me that the pendulum has swung too far and that this over-centralization of power is endangering not only our state and federal mechanism, but the cause of good government and civil liberty itself. It has bred a species of paternalism and indeed of materialism too, which both come to one thing, increase of governmental interference with the rights of the states and with the rights and immunities of the individual in the states. We have in truth too much government. And it is only by bringing government back to the people through active, strong local units that you can overcome either too much government or too feeble or too tyrannical an administration of it.—*Governor Albert C. Ritchie. Address at the Boston City Club. p. 12.*

The onward sweep of the growth of federal power is one of the most surprising facts in our history. Our forefathers framed a constitution which they thought would preserve the rights and prerogatives of the states, on the other hand, and of the federal government, on the other. It is true that Congress still legislates and the federal courts still render decisions in the language of the constitution. The fact is, however, that the theories underlying these federal actions and judicial decisions do not square with the practice of the government and that we are far away in many respects from the ideals and purposes of the framers of the constitution.—*David Kinley. School and Society. 14:590-1. December 24, 1921.*

Before giving assent to proposals, excellent in purpose, to put a stop to child labor, to improve the public



schools, or to aid in bringing about happier and more satisfactory social conditions, whether in the city or on the farm, the question should be asked whether the method proposed is wise and American or unwise and revolutionary. All these things can be accomplished in wise and American ways if men and women will only take the trouble to discover what those ways are and make the effort to walk in them. The overturn of our form of government and the substitution of an imperial democratic for a federal republic would be a sorry outcome of efforts to aid children and women and the less fortunate elements of our citizenship.—*Nicholas Murray Butler. The Faith of a Liberal. p. 207.*

It is not that we [The National Association of Manufacturers] are opposed to the regulation of children in industry, but that we are opposed to the taking away of that subject by the federal government, as being another step in the centralization of power, and one step further in that tremendous centrifugal authority, that grows by leaps and bounds, so that today our government has become so great, so complex, so expensive that now, at this very moment, one dollar in every eight is required for the support of national, state, and local government; and one of every twelve of the persons engaged in gainful occupations in the United States is a federal or a state or a municipal employee.—*James A. Emery. Hearings on the Child Labor Amendment before the Judiciary Committee of the House of Representatives. 1925. p. 213.*

It would be fatal to our political vitality really to strip the states of their powers and transfer them to the federal government. It cannot be too often repeated that it has been the privilege of separate development secured to the several regions of the country by the constitution, and not the privilege of separate development

alone, but also that other, more fundamental privilege that lies back of it, the privilege of independent local opinion and individual conviction, which has given speed, facility, vigor, and certainty to the processes of our economic and political growth. To buy temporary ease and convenience for the performance of a few great tasks of the hour at the expense of that would be to pay too great a price and to cheat all generations for the sake of one.—*Woodrow Wilson. Constitutional Government in the United States. p. 191-2.*

While the control of education is still admitted to be the function of the states and not of the federal government, one measure after another has found its way onto the statute books which tends to break down the integrity of this theory. By accretion, we are getting a nationalized system of education, more and more influenced, if not actually controlled by the federal government. If we are not on our guard, we will find ourselves in a position where not only the character of our educational processes, but immediate authority over them, and control of the means of their support, will be usurped by the federal government and put into the hands of some bureau at Washington conducted by men who neither understand nor appreciate the necessity of the human element in education and educational machinery.—*Samuel P. Capen. School and Society. 14: 590. December 24, 1921.*

For seven years I have observed the Departments and Bureaus of the government at Washington at close range, having had official business with nearly all of them. I am simply appalled at the loafing, indifference, and inefficiency. There are thousands upon thousands of unnecessary employees and endless duplication of alleged effort. There is an inexcusable waste of much more than a half billion dollars a year. According to the reports of the United States Civil Service Commis-

sion, there were 544,671 civilian employees of the Government on December 31, 1923. On June 30, 1925 there were 564,718 employees, an increase of more than 20,000 in a year and a half. The tendency is to increase rather than to diminish the personnel and expenses of the government.—*Congressman Martin L. Davey. Letter to Navy Legal Aid Association. January 18, 1926.*

Nationalism, if unchecked, will destroy the nation. The signs of danger are all around us. The national machinery groans under its over-load. National courts, executive agencies, legislative bodies, all bear witness to their own impaired efficiency and all cry aloud for relief. The lessened interest and energy of the states in the solution of their own political problems and the habit of handing their tasks over to the national government, with the weary gesture of the very sick and the very weak, is directly due to the hypodermic of the New Nationalism, which has anesthetized the states in order to take from them their rightful functions one by one. Our over-crowded, routine-ridden, bewildered national capital and our idle, pouting, irresponsible state capitals are concrete examples of Nationalism run to seed.—*Rhodes S. Baker. Proceedings of the Fortieth Annual Session of the Texas State Bar Association. 1921. p. 221.*

The new American revolution is reaction, not progress. If it is permitted to continue without check, it may readily and within an easily measurable time transform our Federal Republic, which has seemed to many competent observers in different lands to mark the greatest advance that man has yet made in building the structure of government and to offer the greatest measure of hope for his future contentment and prosperity, into an unrecognizable and novel form of despotism, in which now a majority and now various minorities will wreak their will on all that most intimately concerns the individual,

the family, the community, and the state. Whatever incidental advantages such a despotism might reveal, it would be something quite foreign to that government and social order which rest on the Declaration of Independence and the Constitution of the United States.—*Nicholas Murray Butler. The Faith of a Liberal. p. 310.*

I am a strict constructionist, if that means to believe that the federal government is one of delegated powers and that constitutional limitations should be carefully observed. I am jealous of any encroachment upon the rights of the state, believing that the states are as indestructible as the Union is indissoluble. It is, however, entirely consistent with this theory to believe, as I do believe, that it is just as imperative that the general government shall discharge the duties delegated to it, as it is that the states shall exercise the powers reserved to them. There is no twilight zone between the nation and the state, in which exploiting interests can take refuge from both, and my observation is that most—not all, but most—of the contentions over the line between nation and state are traceable to predatory corporations which are trying to shield themselves from deserved punishment, or endeavoring to prevent needed restraining legislation.—*William J. Bryan. Proceedings of the Conference of Governors in the White House, May 13-15, 1908. p. 202.*

In the early days of our history and until perhaps a generation ago, the American people as a whole were jealous of their rights and privileges and surrendered to government just as little as possible. They resented the interference of government with their local concerns or its control over them. The history of the Congress of the United States during the years preceding and just following the civil war abounds in illustrations of this fact. Gradually, however, an unfortunate and distressing

change has come over a considerable portion of our public opinion. There are many men and women who seem no longer to care for the right and privilege of managing their own local affairs, but who are quite willing to leave these to the federal government, if only the result may be a more or less lavish appropriation of funds taken from the people by federal taxation. This tendency, now so marked, is in flat contradiction to the best American traditions and to the most notable American principles.—*Nicholas Murray Butler. The Faith of a Liberal. p. 204-5.*

So wise an observer as deTocqueville, writing nearly a century ago, said, "The federal government is far removed from its subjects, whilst the provincial governments are within easy reach of them all, and are ready to attend to the smallest appeal." Today this judgment is strangely out of harmony with the facts. The agents and officers of the national government are in almost every community and in almost every place of business. In number they have multiplied manyfold, and consequently the cost of maintaining the national government has advanced by leaps and bounds. Where fifty years ago the appearance of an official bearing credentials from Washington was a rare event and occurred only in connection with the postal service, the customs service, or the collection of internal revenue from tobacco and alcoholic liquors, that appearance is now an every day occurrence. It may relate either to some large public interest or to the most intimate details in the administration of a national bank, a railroad, an industrial corporation, or to the food and drink and medicine of the humblest household.—*Nicholas Murray Butler. Building the American Nation. p. 282-3.*

Most of us remember when the activities of the Federal government were confined to matters of a Federal

nature and the private citizen in his daily life was scarcely conscious of the existence of the Federal government. Today the American citizen finds "the path he was to wander in" beset with Federal pitfalls. He finds himself exposed to the danger of being made a criminal by governmental fiat, for the conscious or unconscious violation of any one of a number of penal regulations with which he finds himself enmeshed—a criminal for doing what he and his fathers had considered as part of the birthright of an American citizen. He finds that the Federal government has invaded the sanctity of his home and has undertaken to regulate even the domestic relations of life.

We are now awakening to a realization of the danger of Federal encroachment, which, working like gravity by night and day, gaining a little today and a little tomorrow, and advancing its noiseless steps over the field of jurisdiction, is usurping the legitimate powers of the States and consolidating all governmental authority. —*Edward P. Buford. Constitutional Review. 8:31. January, 1924.*

Moral and social questions originally left to the several states for settlement can be drawn into the field of federal authority only at the expense of the self-dependence and efficiency of the several communities of which our complex body politic is made up. Paternal morals, morals enforced by the judgment and choices of the central authority at Washington, do not and cannot create vital habits or methods of life unless sustained by local opinion and purpose, local prejudice and convenience, unless supported by local convenience and interest; and only communities capable of taking care of themselves will, taken together, constitute a nation capable of vital action and control. You cannot atrophy the parts without atrophying the whole. Deliberate adding to the powers of the federal government by sheer judicial au-



thority, because the Supreme Court can no longer be withstood or contradicted in the states, both saps the legal morality upon which a sound constitutional system must rest, and deprives the federal structure as a whole of that vitality which has given the Supreme Court itself its increase of power. It is the alchemy of decay. —Woodrow Wilson. *Constitutional Government in the United States*. p. 195-6.

The real danger in any attempt at control of corporations by the federal government is that it would be made the excuse for preventing the people of the states from guarding their own interests. Under the plea of a federal license, the dangerous and predatory concerns would claim the right to invade the whole country, without regard to the protests or sound requirements of the states that might desire to protect their people. We are not infants. We do not require the protection of any bureau at Washington. In fact, supervision by the national government would be a farce. No matter how good the intention might be, it would be impossible to supervise the business interests of this great vigorous country of ours by any bureau of clerks at the national capital. Such an attempt would be unwise and unAmerican. We believe in home rule, and the right and duty of self government in this country, and it would be a sorry day indeed when the people of any state in the union acknowledged their inability to protect themselves from the evils and dangerous practices of a corporation created under the laws of their own state, or that of any other state in the union. —W. P. Potter, *Justice of the Supreme Court of Pennsylvania*. *Outlook*. 82:96. January 13, 1906.

Let us continue upon the mistaken theory that state governments are incompetent and incapable of dealing with the problems which concern their internal governmental affairs; let the states continue to remain inactive



and indifferent, looking to the Federal Government for effective settlement of their domestic problems and difficulties as they have in the past, and the time will come, in the opinion of that great statesman [Elihu Root], when the government of the United States will be driven to the exercise of still more arbitrary and unconsidered power, to greater concentration and extension of its functions into the internal business of the states, and then sooner or later the people of the country will reject a government that has subjected their personal and intimate neighborhood affairs to the control of a central power in Washington, and in the place of competent states managing their own business and governing their own affairs in the exercise of their constitutional powers, we shall go through a cycle of concentration of power at the centre while the states dwindle into insignificance, ultimately resulting in the breaking up of the great Republic upon new lines of separation.—*William P. Bynum. American Law Review. 55:40-1. January, 1921.*

The Governor of Virginia, in a recent communication opposing the adoption of the proposed twentieth amendment of the Constitution of the United States, made this excellent statement of conditions by which we are confronted: "The centripetal forces pulling everything in toward centralization in the federal government have of late years grown so strong that they have well-nigh pulled our Republic out of balance. The States have been shorn of more and more of their power, and it has been lodged in the central authority, so that today there is scarce one subject left to local control. The real danger to our institutions is not from without; it is from within. It is the danger arising from taking the control of State affairs out of the hands of State authority, where they can best be administered and lodging them within the grasp of federal power. The process of centralization

has gone on, now by the slow erosion of judicial decision, now swept forward by the flood waters of constitutional amendment, until today about all that is left to the States is their honor and credit. The proposed amendments would take these away and place them irrevocably under the control of the central government.”—*Edward P. Buford. Constitutional Review. 8:23-4. January, 1924.*

When a people is so diverse and so widespread as our own, when differences of climate and of soil are so varied, when economic and social characteristics are so multiform, it is surely the part of wisdom to maintain in fullest integrity that federal form of government which by leaving undisturbed the largest possible measure of local self-government and local control, makes possible that elasticity of the structure of government which enables it to adapt itself readily to these different and constantly changing conditions. A stiff, uniform, and brittle governmental structure extended over a wide area and diverse economic and social conditions, is pretty certain to break to pieces before old age overtakes it. Uniformity and efficiency may be brought at a high price, and in their narrow and bureaucratic aspects they are not in harmony with the American temper and the American mind. Time and circumstance modify and sometimes profoundly alter the meaning of political phrases and slogans. When, during the period of nation-building, States' Rights meant nullification and secession, it was a cry in opposition to the unity, the safety, and the perpetuity of the American form of government; to-day the scene has shifted and the cry States' Rights now signifies the preservation of that just and wise balance between local self-government and central authority upon which our social order and our system of government itself have alike been built.—*Nicholas Murray Butler. The Faith of a Liberal. p. 294-5.*

That the legislative department has sought persistently, and to a certain extent successfully, to encroach on the power of the executive department, history has plainly shown. The most material assumptions have been those connected with the choice of the executive, with his power of appointment, with his veto power, and finally with the treaty making power. It was the intention of the framers of the constitution that the electoral college should choose the President and that Congress should have no concern in his election beyond the mere formal counting of the votes and the announcement of the result. With absolute unconstitutionality and by gradual usurpation Congress has extended its power until to-day it claims the right to go behind the vote and reject or accept what it chooses, thus practically taking the election of President into its own hands; this power it successfully employed in 1876 to defeat the people's will by excluding from office the President actually elected. Doubly regrettable was the action of the Supreme Court, for, in place of restraining this assumption of Congress, the court actually made itself a party to this most high-handed proceeding, when certain judges acted as members of the electoral commission. Nor is this grasp of powers the only attempt Congress has made to interfere in the election of President. The early Congresses of the Union assumed the right to nominate the President, and for thirty years successfully forced upon the people candidates for President.—*Paul Leicester Ford. The Federalist. p. 328-9. Footnote.*

More and more the federal government is taking over the powers of the state, and our nation is in an headlong rush to centralize all government at Washington. This is, indeed, a dangerous tendency, and we should guard against every attempt at such centralization. The federal government proceeds in various ways to acquire this centralization. In some cases under the pretense of regulat-

ing interstate commerce, and in other cases under pretense of establishing post offices and postal routes, and in still other cases by a species of bribery. The state is helpless against the first two methods mentioned. The third method need not succeed unless the state gives its consent. The species of bribery to which I refer consists of legislation by the federal government in making an appropriation for some purpose, under conditions that the state meet that appropriation with a like amount. Sometimes the objects to be accomplished are in the interests of humanity and for a better security of the nation, while in other cases the object sought to be accomplished is to coerce the less progressive states into adopting certain legislation. Some of the purposes are, no doubt, desirable, but to my mind, in many cases the state might better afford to embark upon the same undertaking independently, and by foregoing the appropriation made by the federal government, actually carry out the same project more economically. I therefore recommend to you that you closely scrutinize every project that is presented under the pretense that the state will receive the bounties of the federal government.—*Governor John J. Blaine. Message to the Wisconsin Legislature, January 13, 1921. p. 33-4.*

Even though it be admitted that state governments are less efficient than the nation and that local governments are to a large extent inefficient, the remedy is not to deprive these governments of control over matters of state and local policy; but rather a systematic effort to improve conditions in these governments themselves; for, however much the national government assumes new functions, the effective enforcement of policy will depend upon the sentiment in the states and local communities. Upon the preservation of state governments depends the continuance of our federal system of government. A concentration of authority in the national capital is sure

in the long run to lead to less efficient government, to a high degree of bureaucracy, and to a lessening of the democratic spirit in the national, state, and local governments. The function of the nation in acting as an investigating and coördinating agency, and in reporting upon the results of experience in state and local government, is more important than is the taking over of activities which may more properly be handled through local agencies. And the national government may in the long run be more efficient and more of an aid in the establishment of efficient government throughout the nation by means of activities which will aid the states to solve their own problems, than through plans which seek to take problems from the states themselves. There must be a halt and an immediate halt in the present development of federal subsidies unless the national treasury is to become bankrupt and the states cease to be effective agencies of government in this country. And the national government must cease the assumption of new tasks involving detailed administration unless it is to become highly inefficient.—*Walter F. Dodd. Yale Law Journal. 32:459. March, 1923.*

Congress is slowly losing its power to a multitude of executive bureaucrats. The rescue of the national legislature from this invasion of its prerogatives is the most important concern of the American people today. The American government is dangerously out of focus. The federal government has steadily encroached upon the constitutional rights of the states until their real and sovereign power has entirely wasted away. In the federal government, the executive power today overshadows congress and promises to reduce the legislature to a position of complete subordination. Few citizens realize the serious alteration in the theory and spirit of our government which has taken place in the last few decades. We face today a condition rapidly making inevitable ad-

ministrative tyranny, legislative subserviency and the surrender of their sovereign rights by the states. Undoubtedly the executive machinery of the federal government has grown so much more rapidly than that of the national legislature that the average individual tends to think of the former today as the most important feature of the federal structure. Attention is often drawn to the enormous grist of material being ground out annually by legislatures. It is true that our state and national legislative hoppers work at an enormous clip. But considerably more bulky and alarming than the volume of annual statutes is that of administrative embroidery in the form of rules, regulations and the thousand and one official schedules and forms which administrators delight in devising. It is this "secondary legislation" that the individual meets in most of his contacts with government. Consequently he comes to view the delegation of authority by congress to administrative officers and their bureaucratic staffs as an automatic and natural process. —C. E. McGuire. *Cleveland Plain Dealer*. January 17, 1926.

A power without limit, except in the shifting views of the (United States Supreme) Court, lies in the construction placed upon the Fourteenth Amendment, which passed, as everyone knows, solely to prevent discrimination against the colored race, has been construed by the court to confer upon it jurisdiction to hold any provision of any statute whatever "not due process of law." This draws the whole body of the reserved rights of the states into the maelstrom of the Federal Courts, subject only to such forbearance as the Federal Supreme Court of the day, or in any particular case, may see fit to exercise. The limits between state and federal jurisdiction depend upon the views of five men at any given time; and we have a government of men and not a government of laws, prescribed beforehand. At first the court gener-



ously exempted from its veto the police power of the several states. But since then it has proceeded to set aside an act of the legislature of New York restricting excessive hours of labor, which act had been sustained by the highest court in that great state. Thus labor can obtain no benefit from the growing humanity of the age, if such statute does not meet the views of five elderly lawyers, selected by influences naturally antagonistic to the laboring classes and whose training and daily associations certainly cannot incline them in favor of restrictions upon the power of the employer. The preservation of the autonomy of the several states and of local self government is essential to the maintenance of our liberties, which would expire in the grasp of a consolidated despotism. Nothing can save us from this centripetal force but the speedy repeal of the Fourteenth Amendment or a recasting of its language in terms that no future court can misinterpret it.—*Walter Clark, Chief Justice of the Supreme Court of North Carolina. Arena. 37:15. February, 1907.*

The concentration of power in Washington through the multiplication of administrative bureaus under a perverted interpretation of the "general welfare" clause is the most far-reaching and dangerous of modern legislative tendencies. The Sheppard-Towner Maternity Act and the Sterling-Towner Education bill, now pending in Congress, are conspicuous illustrations of this method of Federal usurpation. If measures of this character are legitimate exercises of Federal power, there is no limit to the possibility of Federal exploitation. Every conceivable form of governmental activity may be subsidized by Federal taxation and the number of Federal office holders be indefinitely increased.

Under the practice now prevailing, these bureaus are created and the power of legislation is delegated to them. They are given authority to write the laws they are to



administer and to change them at pleasure. In other words, they are clothed with full legislative and executive powers and to some extent with judicial power. This method of Federal usurpation is most insidious. It carries with it a bribe and a threat—a bribe to induce a surrender by the States of constitutional principles, and a threat of withholding Federal aid in order to coerce State acquiescence. "Federal aid," says Ex-Governor Lowden of Illinois, "generally speaking, is a bribe offered to State governments to surrender their own proper functions." Federal aid is a delusion. The people pay the taxes whether imposed by Federal or State authority. It may be that Federal taxation will fall more heavily on citizens of some States than others; but it is the spirit of communism that would justify an exercise of the power of Federal taxation to destroy legitimate property rights and impose unequal burdens of taxation for the benefit of one State at the expense of another.—*Edward P. Buford. Constitutional Review. 8:36-7. January, 1924.*

If there is any soundness at all in the doctrine of self-government, the people can act most intelligently upon matters with which they are most familiar. There are a multitude of things which can be done better by the county than by state authority, and there are a multitude of things which can be done better by the state than by the federal government. An attempt to transfer to the national capital the business now conducted at the state capitals would be open to two objections, either of which would be fatal. First, congress could not transact the business. The work now devolving on the national legislature makes it difficult to secure consideration for any except the most important measures. The number of bills actually discussed in a deliberate way is small; most of the bills that pass are rushed through by unanimous consent, and a still larger number die on the calendar or in committee.

Second, the members of congress could not inform themselves about local needs. The interests and industries of the nation are so diversified and the various sections so different in their needs that the members of congress from one part of the country would be entirely ignorant of the conditions in other parts of the country. Whenever congress attempts legislation now for a particular section, the matter is usually left to the members from that section, but more often the matter is crowded out entirely by larger interests.

The farther the legislative body is from the community affected by the law, the easier it is for special interests to control. This has been illustrated in state legislatures when long-time charters have been granted to franchise corporations by the votes of members whose constituents, not being interested, do not hold them to strict account, and it would be worse if congress acted on the same subjects.—*William J. Bryan. Reader. 9:353-4. March, 1907.*

The States are the sheet anchors of our institutions. If the Federal Government should go out of existence, the common run of people would not detect the difference in the affairs of their daily life for a considerable length of time. But if the authority of the States were struck down disorder approaching chaos would be upon us within twenty-four hours. No method of procedure has ever been devised by which liberty could be divorced from local self-government. No plan of centralization has ever been adopted which did not result in bureaucracy, tyranny, inflexibility, reaction and decline. Of all forms of government, those administered by bureaus are about the least satisfactory to an enlightened and progressive people. Being irresponsible they become autocratic, and being autocratic they resist all development. Unless bureaucracy is constantly resisted it breaks down representative government and overwhelms democracy.

It is the one element in our institutions that sets up the pretense of having authority over everybody and being responsible to nobody.

While we ought to glory in the Union and remember that it is the source from which the States derive their chief title to fame, we must also recognize that the national Administration is not and can not be adjusted to the needs of local Government. It is too far away to be informed of local needs, too inaccessible to be responsive to local conditions. The States should not be induced by coercion or by favor to surrender the management of their own affairs. The Federal Government ought to resist the tendency to be loaded up with duties which the States should perform. It does not follow that because something ought to be done the National Government ought to do it. But, on the other hand, when the great body of public opinion of the Nation requires action the States ought to understand that unless they are responsive to such sentiment the national authority will be compelled to intervene. The doctrine of State rights is not a privilege to continue in wrongdoing but a privilege to be free from interference in well-doing. This Nation is bent on progress. It has determined on the policy of meting out justice between man and man. It has decided to extend the blessings of an enlightened humanity. Unless the States meet these requirements, the National Government reluctantly will be crowded into the position of enlarging its own authority at their expense. I want to see the policy adopted by the States of discharging their public functions so faithfully that instead of an extension on the part of the Federal Government there can be a contraction.—*President Coolidge. Address at the College of William and Mary. May 15, 1926. p. 7-8.*

This great seal of New Jersey, which, with reverence, I take into my possession today, does not signify that

power of self-government, that ability to rule its own affairs by the State of New Jersey, in the same way and manner, as when the State of New Jersey was born, from a colony ruled from Europe into a great State, which with twelve other States had flung open a continent to mankind? I do not think so. The power of the State of New Jersey to make her own laws has been encroached upon by Washington that now in every direction she is ruled, instead of ruling.

The people of the State, declared by the State Constitution to be possessors of all political power in the following terms: "All political power is inherent in all people," are shorn of the power to rule themselves, and the State's rights—so clearly defined in the Federal Constitution—are whittled away by Congress, supported by decisions of the United States Supreme Court, until State Government becomes merely a shell. An outstanding example of this is Prohibition, in which Washington regulates, or attempts to regulate, innocent social conduct. Federal Courts override State Courts and fix trolley fares, water rates, the price of public necessities. The Federal Government is even reaching out to control education, and having attempted in the Eighteenth Amendment to regulate the throats of the people, now in the proposed Twentieth, would regulate the minds of the young.

What has become of the declaration of the original compact in the United States Constitution, which said, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people".? These were the fine words of self-governing communities who were free and would remain so. Now it's in some bureau or board created by Congress and functioning in Washington, unaware of local conditions, which makes laws which the people of a State must obey and which the legislators elected by the people of that State are

powerless to alter or repeal. An indissoluble union of indestructible States" is rapidly becoming an indissoluble union of impotent States.

Let us have a meeting of all the Governors in an effort to stop this tide that is bearing us away to a centralized distant government. So complete is Washington's control growing that you even hear of a censorship of the radio. It is dangerous to be governed from afar. It is the people of each State exercising home rule who should do the governing. The best governed are the least governed. Let "Restoration of State's Rights" be our watchword.—*A. Harry Moore. Inaugural address as Governor of New Jersey. January 19, 1926.*

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